80-242

No.

Supreme Court, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1979

EDWARD HIDALGO, SECRETARY OF THE NAVY, PETITIONER

v.

ALICE NAKSHIAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WADE H. MCCREE, JR.
Solicitor General
ALICE DANIEL
Assistant Attorney General
EDWIN S. KNEEDLER
Assistant to the Solicitor General
ROBERT E. KOPP
MICHAEL JAY SINGER
ROBERT A. REUTERSHAN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1979

No.

EDWARD HIDALGO, SECRETARY
OF THE NAVY, PETITIONER

v.

ALICE NAKSHIAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTION PRESENTED

Whether the plaintiff in an action against the United States under Section 15(c) of the Age Discrimination in Employment Act, 29 U.S.C. 633a(c), is entitled to trial by jury.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	1
Reasons for granting the petition	4
Conclusion	15
Appendix A	1a
Appendix B	27a
Appendix C	33a
Appendix D	36a
Appendix E	38a
Appendix F	41a

TABLE OF AUTHORITIES

Cases:

Beacon Theatres v. *Westover*, 359 U.S. 500	13
Blum v. *Gulf Oil Corp.*, 597 F. 2d 936	8
Crowell v. *Benson*, 285 U.S. 22	5
Curtis v. *Loether*, 415 U.S. 189	6, 8
Dairy Queen v. *Wood*, 369 U.S. 469	13
Galloway v. *United States*, 319 U.S. 372	4
Glidden Co. v. *Zdanok*, 370 U.S. 530	4, 12
Great American Fed. Savings & Loan Ass'n v. *Novotny*, 442 U.S. 366	8
Harmon v. *May Broadcasting Co.*, 583 F.2d 410	8
Johnson v. *American Postal Workers Union and United States Postal Service*, Civ. No. 78–1853 (D.D.C. Apr. 24, 1980)	14
Law v. *United States*, 266 U.S. 494	11
Lewis v. *Times Publishing Co.*, 185 F.2d 457	8
Lorillard v. *Pons*, 434 U.S. 575	2, 5, 6, 8

Cases—Continued: Page

McElrath v. *United States*, 102 U.S. 426 4
Olearchick v. *American Steel Foundaries*, 73 F. Supp. 273 8
Parks v. *United States Internal Revenue Service*, No. 78–1518 (10th Cir. Mar. 27, 1980) ... 14
Pernell v. *Southall Realty*, 416 U.S. 363 11
Silverman v. *United States Postal Service*, Civ. No. 79–384 (E.D. Pa. Jan. 3, 1980), appeal pending, No. 80–1441 (3d Cir.) 14
United States v. *King*, 395 U.S. 1 8
United States v. *Mitchell*, No. 78–1756 (Apr. 15, 1980) 12
United States v. *Pfitsch*, 256 U.S. 547 9
Wirtz v. *Jones*, 340 F.2d 901 8

Constitution, statutes and rule:

United States Constitution, Seventh Amendment 3, 4, 5, 6, 7, 8, 9, 10
Age Discrimination In Employment Act (ADEA), 29 U.S.C. 621 *et seq.* 1
Sections 3–13, 29 U.S.C. 622–632 6
Section 4, 29 U.S.C. (and Supp. II) 623 ... 6
Section 7(b), 29 U.S.C. 626(b) 5, 6, 7
Section 7(c), 29 U.S.C. (Supp. II) 626(c) 2, 3, 4, 5, 6, 12
Section 7(c)(2), 29 U.S.C. (Supp. II) 626(c)(2) 12
Section 11(b), 29 U.S.C. 630(b) 6
Section 12a, 29 U.S.C. (Supp. II) 631 (a) .. 6
Section 12(b), 29 U.S.C. (Supp. II) 631(b) . 6
Section 15, 29 U.S.C. (Supp. II) 633a 3, 6, 7
Section 15(a), 29 U.S.C. (Supp. II) 633a(a) 6, 7
Section 15(b), 29 U.S.C. (Supp. II) 633a(b) 6, 7
Section 15(c), 29 U.S.C. 633a(c) 2, 3, 4, 5, 6, 7, 8, 11, 12
Section 15(f), 29 U.S.C. (Supp. II) 633a(f) . 6

Constitution, statutes and rule—Continued: Page

Civil Rights Act of 1964, Sections 717(a) and (b), 42 U.S.C. 2000e-16(a) and (b) 7
Section 717(c), 42 U.S.C. 2000e-16(c) 8
Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, 29 U.S.C. 201 *et seq.* 7
Section 28(b)(2), 88 Stat. 55 3
Judiciary Act of 1789, Sections 9 and 12, 1 Stat. 76, 79 10
Lever Act, ch. 53, Section 10, 40 Stat. 279 9
Revision Act of 1948, Stat. 10
Rev. Stat. 566 (later codified at 28 U.S.C. (1925 ed.) 770) ch 646, Section 39, 62 Stat. 992 .... 10, 11
Rev. Stat. 648 10
Pub. L. No. 95-256, Section 4(a), 92 Stat. 191 .. 12
5 U.S.C. 552(g)(4)(A) 14
28 U.S.C. 1292(b) 2
28 U.S.C. 2402 12
29 U.S.C. 216(b) 14
39 U.S.C. 409 14
39 U.S.C. 1208(b) 14
Fed. R. Civ. P. 38(a) 8

Miscellaneous:

118 Cong. Rec. (1972), p. 24397 7
H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. (1978) 6
H.R. Rep. No. 659, 83d Cong., 2d Sess. (1954) . 13
H.R. Rep. No. 95-527, 95th Cong., 1st Sess. (1977) 6
5 J. Moore, *Federal Practice* (2d ed. 1979) 10

The Solicitor General, on behalf of Edward Hidalgo, Secretary of the Navy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-26a) is not yet reported. The opinion of the district court (App. B, *infra*, 27a–32a) and supplemental opinion of the district court (App. C, *infra*, 33a–35a) are reported at 481 F. Supp. 159.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 36a–37a) was entered on February 19, 1980, and the petition for rehearing was denied on May 5, 1980 (App. E, *infra*, 38a–40a). On July 29, 1980, the Chief Justice extended the time within which to file a petition for a writ of certiorari to August 18, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in Appendix F, *infra*, 41a–45a.

STATEMENT

1. Respondent brought this action in the United States District Court for the District of Columbia against the Secretary of the Navy alleging violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.* She demanded a jury trial, and the government moved to strike that demand (App. A, *infra*, 2a–3a). The district court denied the motion to strike (Apps. B and C,

infra, 27a–35a) but certified for interlocutory appeal under 28 U.S.C. 1292(b) the question whether a jury trial is available in an ADEA action against the federal government (App. A, *infra*, 2a). The court of appeals granted the government's petition for interlocutory review (*ibid.*).

2. A divided panel of the court of appeals affirmed (App. A, *infra*, 1a–26a). The majority noted that there is no constitutional basis for jury trials because "the Seventh Amendment does not apply to suits against the government" (App. A, *infra*, 5a) and also acknowledged the "absence of explicit statutory authorization" for jury trials in federal sector ADEA cases (*id.* at 10a). But the court nevertheless found "enough evidence to support an inference that Congress intended to provide for jury trials" in such cases (*ibid.*). It relied on two factors.

First, the court of appeals found that "the very fact that Congress gave jurisdiction over ADEA suits against the federal government to the District Courts rather than the Court of Claims supports the inference that there is a right to jury trial in such cases" (App. A, *infra*, 10a). Second, the court found this inference to be "strengthened" by Congress' authorization in Section 15(c) of the Act, 29 U.S.C. 633a(c), for the award of "*legal* and equitable relief" against the government (App. A, *infra*, 11a; emphasis supplied by the court). The court noted that, in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), this Court had relied in part upon the authorization for the award of "legal" relief under Section 7(c) of the ADEA (29 U.S.C. (Supp. II) 626(c)), in concluding that Congress intended to confer a statutory right to a jury trial in an ADEA action against a private employer under that section, and it reasoned that Congress must be assumed to have conferred the same right in suits against the federal government because it also used the word "legal" in Section 15(c).

Judge Tamm dissented (App. A, *infra*, 15a–26a). He observed that the legislative history of the Fair Labor Standards Act Amendments of 1974, in which Congress enacted the present Section 15 of the ADEA to provide protection against age discrimination for federal employees,[1] "does not mention the issue of jury trials under section [15]" (App. A, *infra*, 19a). Judge Tamm also noted that when Congress amended Section 7(c) of the Act in 1978 to provide for the right to jury trial in cases brought against private employers (and state and local governments), it did not amend Section 15(c) to provide for jury trials in cases brought against the federal government (App. A, *infra*, 21a–22a). In Judge Tamm's view, moreover, Congress' decision to extend protection against age discrimination to federal employees "does not necessarily mean Congress intended to establish the same procedures for federal employees to enforce those protections" as were then available to employees in the private sector (*id.* at 20a).

Finally, Judge Tamm found the majority's reliance on *Lorillard* misplaced, because the allowance of jury trials against the federal government raises "different concerns" than do jury trials involving private employers. By the same token, Judge Tamm concluded that the majority erred in focusing on Congress' use of the phrase "legal * * * relief" in Section 15(c), because the Court in *Lorillard* found that to be a term of art relevant only in determining when the Seventh Amendment right to a jury trial attaches in suits between private parties.[2]

---

[1] Section 15 of the ADEA was added by Section 28(b)(2) of the Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93–259, 88 Stat. 55.

[2] The government's petition for rehearing and suggestion for rehearing en banc were denied, with four judges dissenting (Apps. E and F, *infra*, 38a–40a).

REASONS FOR GRANTING THE PETITION

It is well settled that the Seventh Amendment right to trial by jury in cases at common law does not extend to actions against the federal government, because suits against the sovereign were unknown at common law and were therefore not among the category of cases for which the right to jury trial was "preserved" upon adoption of the Seventh Amendment. See *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962) (Harlan, J.); *Galloway* v. *United States*, 319 U.S. 372, 388–389 (1943); *McElrath* v. *United States*, 102 U.S. 426, 440 (1880). Accordingly, there is no right to trial by jury in actions against the government unless "Congress, in the legislation cited, has made it applicable." *Galloway* v. *United States*, *supra*, 319 U.S. at 389.

In the present case, the court of appeals found a right to trial by jury in ADEA cases against the government despite (i) the lack of explicit statutory authorization for such trials, (ii) the failure of Congress to amend Section 15(c) in 1978 expressly to provide for jury trials in cases against the federal government, even though it amended Section 7(c) at that time to provide for such trials in other ADEA cases, and (iii) the total absence of any indication in the legislative history of the 1974 and 1978 amendments to the ADEA of a congressional intent to confer such a right. The court of appeals relied solely on the fact that Congress had granted jurisdiction over federal sector ADEA cases to the district courts, rather than the Court of Claims, and had authorized the courts to award "legal" relief. But there is no reason to believe that either provision was intended to imply anything in regard to jury trials.

The result below will lead to widespread demands for jury trials in ADEA cases in the District of Columbia, where many federal employees work, and elsewhere.

Moreover, the ease with which the court of appeals inferred a right to a jury trial against the federal government in the absence of any evidence of congressional intent may lead to similar results under many other statutes in which Congress has conferred jurisdiction on the district courts and has authorized the award of what could be characterized as "legal" relief against the government. Review by this Court therefore is warranted.

1. The court of appeals plainly erred in inferring an intent to grant a statutory right to trial by jury from the fact that Congress authorized the district courts to award "legal" as well as "equitable" relief in actions brought against the federal government under Section 15(c) of the ADEA. This Court's decision in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), relied upon by the court of appeals (App. A, *infra*, 11a), does not support such an inference.

Lorillard involved an action brought against a private employer under Section 7(c) of the ADEA. The plaintiff argued that the Seventh Amendment guarantees a right to trial by jury in a private action for lost wages under that section or, alternatively, that the ADEA itself grants such a right. The Court decided the case on statutory grounds, finding that "'a construction of the statute is fairly possible by which the [constitutional] question may be avoided'" (434 U.S. at 577, quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)).

In construing the statute to avoid a constitutional question under the Seventh Amendment, the Court found it significant that Section 7(b) of the Act authorizes a district court to grant "*legal* or equitable relief" and Section 7(c) authorizes employees to bring actions for "*legal* or equitable relief" (434 U.S. at 583; emphasis supplied by the Court). The Court viewed the word "legal" as a term of art in this context, because "[i]n cases in which legal relief

is available and legal rights are determined, the Seventh Amendment provides a right to jury trial" (*ibid.*, citing *Curtis* v. *Loether*, 415 U.S. 189, 195–196 (1974)). Because the word carried an established implication with respect to the availability of jury trials under the Seventh Amendment, the Court could infer that "Congress knew the significance of the term 'legal,' and intended that there would be a jury trial on demand" (434 U.S. at 583).

Sections 7(b) and (c) of the ADEA, involved in *Lorillard*, have no application to actions brought against the federal government. The present case arises under Section 15(c), which was added to the ADEA in 1974 to establish wholly separate substantive and procedural provisions governing age discrimination in federal employment.[3] The separate nature of Section 15 was made explicit by the addition thereto in 1978 of subsection (f), which provides that personnel actions in the federal government shall not be "subject to, or affected by" any other provisions of the Act.[4] See H.R. Rep. No. 95–527, 95th Cong., 1st Sess. 11 (1977) ("Section 15 * * * is complete in itself"); H.R. Conf. Rep. No. 95–950, 95th Cong., 2d Sess. 11 (1978) (Sec-

---

[3] Thus, Section 15(a) states a separate substantive prohibition against age discrimination in the federal government; federal employees were not brought under the substantive prohibitions against age discrimination in Section 4 of the Act, 29 U.S.C. (and Supp. II) 623, applicable to employees in the private sector and state and local government. See Section 11(b) of the Act, 29 U.S.C. 630(b). Moreover, administrative and enforcement responsibility under Section 15(b) was vested in the Civil Service Commission, not the Secretary of Labor, who had responsibility in the private sector under Sections 3–13 of the Act, 29 U.S.C. 622–632. See App. A, *infra*, 20a–21a & n.6 (Tamm, J., dissenting).

[4] Section 15(f) contains but one exception to this rule: federal personnel actions are subject to Section 12(b) of the Act, 29 U.S.C. (Supp. II) 631(b), which provides that the prohibitions in Section 15 are limited to persons over age 40, without the upper age limitation of 70 applicable in the private sector and state and local government. See 29 U.S.C. (Supp. II) 631(a).

tion 15 "is independent of any other section of the act, except section 12(b) which contains the age limitation for federal employees" (see note 4, *supra*)).

There is no occasion to construe Section 15(c) in any particular way in order to avoid a constitutional question, because the Seventh Amendment does not apply to suits against the federal government. Nor, for the same reason, can the word "legal" be deemed a term of art as respects the availability of jury trials in cases involving the federal government. Congress therefore cannot be thought to have attached any particular significance to the term when it enacted a separate section of the ADEA dealing with federal employment in 1974, and it would be improper to infer an intent to confer a right to jury trial from the use of the word in Section 15(c).[5]

---

[5]The other basis for the Court's holding in *Lorillard* likewise has no application to suits against the federal government under Section 15(c). The Court found it significant in *Lorillard* that Section 7(b) states that the ADEA is to be enforced "in accordance with the powers, remedies, and *procedures*" provided in certain sections of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* (434 U.S. at 580–581; emphasis supplied by the Court). The Court noted that it was well established prior to enactment of the ADEA in 1967 that there was a right to a jury trial in private actions pursuant to the FLSA, and the Court held that Congress, in incorporating FLSA procedures, must therefore be presumed to have intended the jury trial right to apply under the ADEA (434 U.S. at 580–581).

In amending the ADEA to furnish protection against age discrimination for federal employees, however, Congress departed from the FLSA model it had adopted for suits against private employers and chose instead to pattern Section 15 after Section 717(a) and (b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–16(a) and (b), which also bars discrimination in federal employment. The language in Sections 15(a) and (b) of the ADEA is substantially similar to that of Sections 717(a) and (b) of the Civil Rights Act, and Senator Bentsen, the principal sponsor of the present Section 15 of the ADEA, explained that "[t]he measures used to protect federal employees [from age discrimination] would be substantially similar to those incorporated" in Title VII. 118 Cong. Rec. 24397 (1972). Although this Court has not

2. The court of appeals also erred in concluding that an affirmative congressional intent to provide for jury trials in ADEA cases against the federal government could be inferred from the fact that Congress had vested jurisdiction over such cases in the district court, not the Court of Claims. The court of appeals cited nothing in the legislative history to support this inference, and we have found nothing in the hearings, floor debates, or committee reports. The more likely explanation for this grant of jurisdiction—if it is necessary to look for one—is that the district courts are accustomed to awarding equitable relief of the type authorized under Section 15(c), but the Court of Claims is not. See *United States* v. *King*, 395 U.S. 1, 3 (1969).[6] Rule 38(a) of the Federal Rules of Civil Procedure

---

yet decided the question, the lower courts are unanimous that there is no right to a jury trial under Title VII, even in an action against a private employer. *Great American Fed. Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 375 (1979); *Lorillard* v. *Pons*, *supra*, 434 U.S. at 583–584; *Curtis* v. *Loether*, *supra*, 415 U.S. at 196–197 & n.13; see also *Blum* v. *Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Harmon* v. *May Broadcasting Co.*, 583 F.2d 410 (8th Cir. 1978). (collecting cases). Accordingly, there is no reason to believe that Congress, when it patterned Section 15 after Section 717 of the Civil Rights Act, intended to confer a statutory right to a jury trial. See also 29 U.S.C. (Supp. II) 633a(f).

In any event, there would be no statutory right to jury trial under Section 15(c) even if that section were thought to be analogous to the FLSA. The lower court cases cited by the Court in *Lorillard* as recognizing a right to jury trial in FLSA actions all appear to have rested on the Seventh Amendment, not the FLSA itself. *Wirtz* v. *Jones*, 340 F.2d 901, 903–904 (5th Cir. 1965); *Lewis* v. *Times Publishing Co.*, 185 F.2d 457 (5th Cir. 1950); *Olearchick* v. *American Steel Foundries*, 73 F. Supp. 273, 277–279 (W.D. Pa. 1947). These cases thus do not suggest that there is a statutory right to a jury trial against the federal government under the FLSA or, by analogy, under the ADEA.

[6] Distributing these cases among the district courts also avoids the substantial increase in the docket of the Court of Claims that would result if all federal sector ADEA cases were concentrated there, and provides a more convenient forum for plaintiffs. In addition, vesting jurisdiction over federal ADEA cases in the district courts is consist-

provides that the right to trial by jury "as declared by the Seventh Amendment to the Constitution or *as given by a statute of the United States* shall be preserved to the parties inviolate" (emphasis added). This language certainly does not state a general rule or presumption that jury trials are available whenever Congress confers jurisdiction on the district courts. To the contrary, it is still necessary to look elsewhere for a specific, affirmative grant of a right to jury trial where, as here, the Seventh Amendment does not apply.

In attaching significance to the jurisdictional grant, the court of appeals placed substantial reliance on *United States* v. *Pfitsch*, 256 U.S. 547 (1921). That case concerned whether jurisdiction granted to the district courts by Section 10 of the Lever Act (ch. 53, 40 Stat. 279) over actions brought to recover just compensation for certain war supplies requisitioned by the federal government was under the Tucker Act or under the ordinary jurisdiction of the district court. The issue was raised because it affected the manner of appellate review (256 U.S. at 549). But the Court observed that its decision would also incidentally affect the right to a jury trial, because there was no such right under the Tucker Act but there was one under "the law governing the usual procedure of a District Court in actions at law for money compensation" (*id.* at 550). The Court noted that Congress had considered and rejected a proposal to confer Tucker Act jurisdiction under Section 10 (*id.* at 550–551). Thus, in the Court's view, "Congress had this question presented to its attention in a most precise form," and it was "difficult to conceive of any rational ground for rejecting the clear and explicit amendment

---

ent with Congress' similar grant of jurisdiction under Section 717(c) of the Civil Rights Act of 1964 with respect to claims against the federal government, which, as we have pointed out (see note 5, *supra*), does not carry with it a right to jury trial.

made by the Senate except to accord a trial by jury" (*id.* at 552).

In the present case, in contrast, Congress did not consider either the possibility of conferring jurisdiction over federal sector ADEA claims on the Court of Claims rather than the district courts or the wisdom of authorizing jury trials in such cases. Moreover, one can readily "conceive of [a] rational ground" for conferring jurisdiction on district courts in ADEA cases other than to confer a right to a jury trial. The statute here, unlike in *Pfitsch*, authorizes equitable relief, not merely the award of a money judgment that could be made as readily by the Court of Claims.

The court of appeals' reliance on *Pfitsch* was misplaced for another reason as well. When *Pfitsch* was decided, Section 566 of the Revised Statutes (later codified at 28 U.S.C. (1925 ed.) 770) provided: "The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury." See also Rev. Stat. 648.[7] Because *Pfitsch* was an action at law, it was within the reach of the statutory jury trial guarantee in Rev. Stat. 566 and could be excepted only if it fell under the Tucker Act's express provision for trial without a jury. When the Court concluded that jurisdiction was not invoked under the Tucker Act, it necessarily followed that the jury trial right in Rev. Stat. 566 attached.

The Revision Act of 1948, however, repealed the pertinent portion of 28 U.S.C. (1925 ed.) 770. Ch. 646, Section 39, 62 Stat. 992. As a result, there is no longer any generally applicable statutory right to jury trial in federal dis-

---

[7] These provisions were derived from Sections 9 and 12 of the Judiciary Act of 1789, ch. 20, 1 Stat. 76, 79. See generally 5 *Moore's Federal Practice* ¶ 38.08[5], at 71-73 (2d ed. 1979).

trict court as there was when *Pfitsch* was decided. Compare *Pernell* v. *Southall Realty*, 416 U.S. 363, 365–366 (1974). It is therefore necessary to look either to the Seventh Amendment (which does not apply in the present case) or to the governing statute to find an affirmative grant of that right. As we have explained, the governing statutory provision here, Section 15(c) of the ADEA, does not confer a right to jury trial.[8]

3. In *Lorillard*, the Court was able to rely on certain features of Section 7(c) of the ADEA that made it "fairly possible" to construe that section to confer a right to a jury trial (and thereby to avoid the Seventh Amendment question), even in the absence of any firm indication of a deliberate congressional decision to provide such a right.

In a case such as *Lorillard*, it may be appropriate to indulge the presumption that Congress would not intend a grudging availability of jury trials in the types of private causes of action to which the Seventh Amendment generally applies, and that Congress itself is fully prepared to recognize a right to trial by jury wherever the particular cause of action would arguably fall within the ambit of the Seventh Amendment guarantee.

Section 15(c), however, cannot be construed by application of a canon of construction designed to avoid constitutional questions or by resort to a presumption that Congress is prepared to recognize a right to jury trial against the federal government wherever a Seventh Amendment question might be raised in a comparable suit against a private party. To the contrary, the experience where

---

[8]The court of appeals also relied (App. A, *infra*, 11a) upon *Law* v. *United States*, 266 U.S. 494 (1925), in attaching significance to the grant of jurisdiction to district courts. But *Law* merely cites *Pfitsch*, adding nothing to the analysis (266 U.S. at 496). The discussion of the jury trial right in that case was dictum in any event because the dis-

Congress has waived the sovereign immunity of the United States to allow suits against the government has been that jury trials ordinarily are *not* available.[9] In claims for money damages sounding in tort or contract, for example—the very types of actions at law in which the Seventh Amendment would guarantee a right to jury trial in a case involving private parties—28 U.S.C. 2402 expressly provides that trial in the district court shall be without a jury. And jury trials historically have not been available in actions for a money judgment brought in the Court of Claims. See, *e.g.*, *Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 572.

Against this background, the courts must assume that Congress does not intend to permit jury trials when it authorizes actions against the United States, unless Congress affirmatively and expressly so provides. See 28 U.S.C. 2402 (jury trials available in tax refund suit under 28 U.S.C. 1346(a)(1)); cf. *United States* v. *Mitchell*, No. 78-1756 (Apr. 15, 1980), slip op. 3 (waiver of sovereign immunity cannot be implied, but must be "unequivocally expressed").[10] The court of appeals' decision, which in ef-

---

trict court had granted the government's motion to strike the jury trial demand, and the Court reversed for reinstatement of the district court's judgment against the government sitting without a jury. At the time *Law* was decided, moreover, 28 U.S.C. (1925 ed.) 770 furnished a statutory right to jury trial in such cases.

[9] When Congress waives the government's sovereign immunity, the terms of its consent to suit define the court's jurisdiction to hear the case. *United States* v. *Mitchell*, No. 78-1756 (Apr. 15, 1980), slip op. 3. Thus, the question in the present case is not what construction of the statute is "fairly possible," but what terms of suit Congress affirmatively authorized.

[10] Indeed, not only is there no evidence of an affirmative congressional intent to provide jury trials in federal sector ADEA cases, the record reflects a contrary determination. In 1978, when Congress amended Section 7(c) and codified the result in *Lorillard* by providing for jury trials in ADEA suits against private employers (and state and local governments) (see 29 U.S.C. (Supp. II) 626(c)(2), as added by

fect creates a presumption *in favor* of jury trials in suits against the government (see App. A, *infra*, 9a n.4), represents a marked departure from these principles.

4. The court of appeals' holding in this case, if allowed to stand, will result in a demand for jury trials in many ADEA cases in the District of Columbia, where a large number of federal employees work,[11] and will surely be relied upon by plaintiffs in federal sector ADEA cases elsewhere. Moreover, some plaintiffs in Title VII cases also include ADEA claims in their complaints, and more may do so in order to take advantage of a right to jury trial under the ADEA. Cf. *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962); *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959).[12] Jury trials in ADEA cases generally would increase the time and expense of litigating these cases and would add to the congestion in the courts. In addition, as Judge Tamm noted, jury trials might lead to damage awards that are "overly generous because of the virtually unlimited ability of the Government to pay the verdict" (App. A, *infra*, 23a, quoting H.R. Rep. No. 659, 83d Cong., 2d Sess. 3 (1954)).

Pub. L. No. 95-256, Section 4(a), 92 Stat. 191), it could easily have amended Section 15(c) to provide for jury trials in age discrimination cases against the federal government as well. Congress' failure to do so, even though it amended Section 15 in other respects, serves to confirm that jury trials are not available in such cases. See App. A, *infra*, 21a-22a (Tamm, J., dissenting).

[11] We have been informed by the Office of the United States Attorney for the District of Columbia that jury trials have been demanded in 16 ADEA cases against the government now pending in the District of Columbia.

[12] We have been informed by the Office of the United States Attorney for the District of Columbia that there are 23 Title VII cases pending in the District of Columbia in which an ADEA claim has also been included in the complaint.

The court of appeals' ruling may also lead to the inferring of a right to trial by jury in actions under other statutes brought against the United States in the District of Columbia merely because Congress has conferred jurisdiction on the district court and authorized the award of what could be characterized as "legal" relief. Thus, for example, the District Court for the District of Columbia, relying on the court of appeals' decision in this case, has recently held that a plaintiff is entitled to trial by jury in an action alleging breach of a collective bargaining agreement filed against the United States Postal Service under 39 U.S.C. 1208(b). See *Johnson* v. *American Postal Workers Union and United States Postal Service*, Civ. No. 78–1853 (D.D.C. Apr. 24, 1980). The litigation workload of the District Court for the District of Columbia, which hears a high percentage of suits against the government, will increase considerably if jury trials are made available in the many areas in which innovative plaintiffs might seek them. See, *e.g.*, 5 U.S.C. 552(g)(4)(A) (action for actual damages sustained from intentional or willful violation of Privacy Act);[13] 29 U.S.C. 216(b) (action for wages and liquidated damages under the FLSA); 39 U.S.C. 409 (actions against the United States Postal Service, including, *e.g.*, damages for breach of lease).[14] The standards for determining the availability of jury trials in actions against the government, under the ADEA and generally, therefore warrant this Court's attention.

---

[13]Cf. *Parks* v. *United States Internal Revenue Service*, No. 78–1518 (10th Cir. Mar. 27, 1980) (action will lie under Privacy Act for damages resulting from mental distress or embarrassment).

[14]See *Silverman* v. *United States Postal Service*, Civ. No. 79–384 (E.D. Pa. Jan. 3, 1980) (denial of motion for jury trial), appeal pending, No. 80–1441 (3d Cir.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ROBERT E. KOPP
MICHAEL JAY SINGER
ROBERT A. REUTERSHAN
Attorneys

AUGUST 1980

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1672

ALICE NAKSHIAN

v.

W. GRAHAM CLAYTOR, in His Official Capacity as Secretary of the Navy, *et al.*, APPELLANTS

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 78-0867)

Argued September 28, 1979

Decided February 19, 1980

Judgment entered this date

Michael Jay Singer, Attorney, Department of Justice, with whom *Carl S. Rauh*, United States Attorney at the time the briefs were filed, and *Robert E. Kopp*, Attorney, Department of Justice, were on the brief, for appellants.

Terry Coleman for appellee. *Patricia J. Barry* also entered an appearance for appellee.

Before WRIGHT, *Chief Judge*, BAZELON, *Senior Circuit Judge*, and TAMM, *Circuit Judge*.

Opinion for the court filed by *Chief Judge* WRIGHT.

Dissenting opinion filed by *Circuit Judge* TAMM.

WRIGHT, *Chief Judge*: This interlocutory appeal, pursuant to 28 U.S.C. § 1292(b) (1976),[1] is from a District Court order denying the Government's motion to strike the plaintiff's request for a jury trial in her action against the Secretary of the Navy for alleged violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* (1976), as amended by Pub. L. No. 95-256, 95th Cong., 2d Sess. (April 6, 1978), 92 STAT. 189-193. It raises questions concerning the right to a jury trial in an ADEA action against the federal government. District Judge Oberdorfer certified the issue for interlocutory appeal, and we granted the Government's petition for interlocutory review.

I

Appellee was a 62-year-old civilian employee of the United States Department of the Navy at the time she brought this action in the District Court under Section 15(c) of the ADEA, 29 U.S.C. § 633a(c) (1976),[2] against the Navy for alleged age discrimination in violation of

---

[1] Under 28 U.S.C. § 1292(b) (1976) a District Court may certify, and the Court of Appeals may thereupon permit, appeals from interlocutory orders which involve "a controlling question of law as to which there is substantial ground for difference of opinion" and immediate review of which "may materially advance the ultimate termination of the litigation."

[2] That section provides:

> Any person aggrieved [by age-based discrimination] may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

the ADEA. She requested a jury trial. The Government moved to strike the request on the grounds that Congress, in authorizing ADEA actions against the federal government, did not specifically authorize jury trials and, therefore, that jury trials are barred by the doctrine of sovereign immunity.

The District Court denied the Government's motion, suggesting in its memorandum opinion that this result followed from the Supreme Court's decision in *Lorillard v. Pons*, 434 U.S. 575 (1978). In that case the Supreme Court held that there is a right to jury trial in an ADEA suit brought against private employers pursuant to Section 7(c), 29 U.S.C. § 626(c) (1976), of the Act. The Supreme Court noted that Congress had expressly provided that the enforcement of the ADEA would be in accordance with the "powers, remedies, and procedures" of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* (1976), and it has long been settled that there is a right to a jury trial in actions brought against private employers under the FLSA. The Supreme Court inferred from this that Congress must have intended to provide for a similar jury trial right in actions brought against private employers under the ADEA. In addition, the Court found the use of the term of art "legal * * * relief" in the wording of the statute significant. In the Court's view it provided further evidence of Congress' intention to provide for jury trials since it is settled that in cases in which legal relief is available and legal rights are determined the Seventh Amendment guarantees the right to jury trial.

The District Court pointed out that the same "legal * * * relief" language that the Supreme Court found significant in *Lorillard* is used in Section 15(c) of the Act, 29 U.S.C. § 633a(c) (1976), which authorizes suits against the federal government. The court also noted that as originally enacted the ADEA did not apply to

the Government. In amending the Act in 1974 to make it applicable to the Government, Congress made few changes in the Act. Indeed, it used the exact same language in Section 15(c), 29 U.S.C. § 633a(c), as it had used in Section 7(c), 29 U.S.C. § 626(c). This, in the court's view, indicated that Congress intended suits against the Government to be on equal footing with suits against private employers. Finally, the court observed that if Congress had intended to preclude jury trials in ADEA suits against the federal government it would have done so.

II

The Government rejects the District Court's analysis. It argues that since the Seventh Amendment right to jury trial applies only to "suits at common law," and at common law suits against the Government were barred by the doctrine of sovereign immunity, the right to jury trial therefore does not apply to actions against the Government under Section 15(c) of the Act. It further notes that Congress may, in waiving the Government's sovereign immunity, dictate the particular terms and conditions under which a suit against it may be brought. From these premises the Government purports to draw the conclusion that the availability of jury trial in actions against the Government requires a specific statutory provision to that effect; that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969). It then examines the language and legislative history of the ADEA for such an explicit grant of a right to jury trial and, not surprisingly, is unable to find any.

The Government also rejects the suggestion that the Supreme Court's reasoning in *Lorillard* supports the inference that there is a jury trial right in ADEA actions against the Government. It notes that the FLSA right to a jury trial on which the Court relied in *Lorillard* was

in fact based on the Seventh Amendment. Since the Seventh Amendment does not apply to suits against the Government, this supports the inference that there is no right to jury trial in ADEA actions against the Government. Similarly, it contends that the jury trial connotation of the term "legal * * * relief" derives from the Seventh Amendment and therefore cannot apply to actions against the Government. Finally, the Government maintains that Congress' response to the *Lorillard* decision supports its position. In 1978 Congress amended Section 7(c) by enacting language that expressly provides for jury trials in ADEA actions brought against private employers. Since no similar action was taken with respect to Section 15(c), the Government argues that Congress did not intend to allow jury trials in ADEA actions against the federal government.

Appellee does not dispute the Government's claim that the Seventh Amendment guarantee of jury trial does not apply to actions against the Government, or the claim that Congress may prescribe the procedure to be followed in a suit when it waives the Government's sovereign immunity. She does, however, reject the Government's claim that there is a right to sovereign immunity from jury trial which may be inferred from these two premises. In her view the Government confuses the well established principle of sovereign immunity from suits without its consent with an unrecognized principle of sovereign immunity from jury trials. Appellee argues that there is no automatic presumption against jury trial in actions against the Government and no unequivocal grant of a right to jury trial need be found. Rather, the issue is an ordinary one of statutory interpretation—whether or not Congress intended that employees who bring ADEA actions against the Government should have a right to jury trial. To support her claim that Congress intended to grant a right to jury trial in ADEA actions against the Government, appellee looks to the language and legislative history of the ADEA.

She notes that, as originally enacted, neither the FLSA nor the ADEA applied to the Government. In 1974 Congress simultaneously amended both statutes to extend their coverage to federal employees. It amended the definition of "employee" in Section 3(e) of the FLSA, 29 U.S.C. § 203(e) (1976), to include federal employees. In addition, Section 16(b) of the FLSA, 29 U.S.C. § 216 (b) (1976), which creates a private right of action for unpaid wages and liquidated damages, was revised to provide that "[a]ction to recover such liability may be maintained against *any employer (including a public agency)* in any Federal or State court of competent jurisdiction * * *." (Emphasis added.) Appellee maintains that the manner in which federal employees were brought under the FLSA makes it clear that Congress wanted the same procedures to apply to their lawsuits as had previously been applied in suits against private employers. Appellee concludes that federal employees have a right to jury trial in FLSA suits against the Government, and points out that the court so held in *Carter v. Marshall*, Civil Action No. 77-165 (D. D.C. April 20, 1978).

Appellee argues that given this, the result in the instant case flows ineluctably from the *Lorillard* decision. *Lorillard* held that Congress intended that the ADEA be enforced in accordance with the procedures of the FLSA. Since, as just shown, Congress intended to grant a right to jury trial in all FLSA actions, including those brought by federal employees, we must presume that Congress intended to grant a similar right in ADEA actions against the federal government. Appellee notes that Congress viewed the application of the ADEA to the federal government as a "logical extension of the * * * decision to extend FLSA coverage to Federal * * * employees." S. Rep. No. 93-690, 93d Cong., 2d Sess. 55 (1974). Moreover, the original exclusion of federal employees from the coverage of the ADEA was an over-

sight which was due to the fact that in 1967 when the ADEA was enacted most Government employees were not covered by the FLSA. *Id.* This close linkage between the FLSA and the ADEA, appellee maintains, supports the inference that Congress wanted FLSA procedures, including the right to jury trial, to apply in ADEA actions against the Government.

Appellee also finds support for her position in the language of the ADEA. *Lorillard* relied in part on Section 7(b) of the Act, 29 U.S.C. § 626(b), which states:

> The provisions *of this chapter* shall be enforced in accordance with the powers, remedies, and procedures of [the FLSA]. * * *

(Emphasis added.) By referring to the *entire chapter*, Section 7(b) explicitly applies to actions brought under Section 15 of the Act, 29 U.S.C. § 633a. When Congress added Section 15 to the Act in 1974 it would have amended Section 7(b) if it did not want FLSA procedures to apply in actions against the Government. Since it did not, it must be assumed that Congress' intention was that FLSA procedures, including the right to jury trial, should apply in ADEA actions.

Furthermore, appellee notes that the same term of art "legal * * * relief" that the Supreme Court found significant in *Lorillard* appears in Section 15(c) of the ADEA, 29 U.S.C. § 633a(c), and therefore gives rise to the same jury trial inference that the Supreme Court drew in *Lorillard*. Appellee rejects the Government's attempt to distinguish *Lorillard* by arguing that the term was significant in that case only because of the Seventh Amendment. Appellee points out that *Lorillard* was not decided on the basis of the Seventh Amendment. Regardless of how the term "legal * * * relief" acquired its jury trial gloss, the holding in *Lorillard* was that its use implies that jury trial was intended.

Finally, appellee contends that the very fact that Congress vested jurisdiction in the District Court rather than the Court of Claims supports the inference of a right to jury trial.[3] She notes that the Supreme Court has intimated that when Congress confers jurisdiction over actions against the United States in the District Courts, it may be inferred that it intended to provide for jury trials. *United States v. Pfitsch*, 256 U.S. 547 (1921); *Law v. United States*, 266 U.S. 494 (1925). And Congress has shown that it is aware that a right to jury trial may be inferred when jurisdiction over actions against the United States is vested in the District Courts by expressly providing that there be no jury trial in most of these cases. *See* 28 U.S.C. § 2402 (1976) (providing that most actions under 28 U.S.C. § 1346 (1976) shall be tried by the court without a jury). The absence of any such provision in the ADEA is further indication that jury trial was intended.

III

The first issue that we must resolve is whether the Government is correct in arguing that there is a sovereign immunity from jury trial that can only be waived by explicit statutory language or legislative history.

In our view the Government's argument rests on a serious misconception. The doctrine of sovereign immunity bars suits against the Government without its consent. Congress can waive this immunity by authorizing such suits. In so doing it can specify the procedures to be followed, including whether the case is to be tried to a jury or to the court. In the absence of an explicit statutory provision, it is the task of the courts to deter-

---

[3] It has long been settled that actions in the Court of Claims are tried without a jury. *See McElrath v. United States*, 102 U.S. (12 Otto) 426 (1880).

mine what type of trial—jury or court—Congress intended to authorize.[4]

By authorizing ADEA suits against the Government, Congress waived the Government's sovereign immunity, although it did not explicitly state what trial procedure is to be used in such cases. This does not, however, create an automatic presumption against jury trial in such cases. Rather, it presents us with an ordinary question of statutory interpretation—whether or not Congress intended that employees who bring ADEA actions against the Government should have a right to demand that the case be tried to a jury. Our task then is to see "if [the] statute, *expressly or by fair implication* so provides." 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2314 at 69 (1971) (emphasis added; footnote omitted). *See also* 5 J. MOORE, FEDERAL PRACTICE ¶ 38.31 [2] at 236 (2d ed. rev. 1979).

---

[4] The Government and the dissent insist on an "express statement or * * * clear implication," dissenting opinion, —— F.2d at —— (p. 6), before they can find that there is a right to jury trial in an action against the Government. This view seems to be based on the supposition that there is a presumption against jury trial in actions against the Government even where sovereign immunity has been waived. The source of this supposition is not clear, but it appears to be connected with a misunderstanding of the doctrine of sovereign immunity. *See* dissenting opinion, —— F.2d at —— (pp. 11-12). Since sovereign immunity bars *all* actions against the Government—actions tried to the court as well as those tried to a jury—it is difficult to see why this doctrine should create a presumption against any particular method of trial. Indeed, if there are to be any presumptions, it would seem that the preference for jury trials in our jurisprudence would support a presumption in favor of such trials. In any event, once Congress has waived the Government's immunity, and where it has not explicitly specified the trial procedure to be followed, sovereign immunity drops out of the picture. Courts must then scrutinize the available indicia of legislative intent to see what trial procedure Congress authorized.

Courts can, and do, infer a congressional intention to allow jury trials in actions against the Government in the absence of explicit statutory authorization. For example, in *United States v. Pfitsch*, *supra*, 256 U.S. 547, the Supreme Court concluded that actions brought against the Government under the Lever Act of 1917, 40 STAT. 276 (1917), may be tried to a jury even though the statute did not provide for jury trials. Similarly, although the War Risk Insurance Act, 38 U.S.C. § 445 (1952) (now codified at 38 U.S.C. § 784 (1976)), did not, as originally enacted, provide for jury trials, it was construed by the Supreme Court to import "the usual procedure * * * in actions at law for money compensation," including trial by jury, in actions against the Government. *Law v. United States*, *supra*, 266 U.S. at 496; *accord*, *Galloway v. United States*, 319 U.S. 372, 389 n.18 (1943).

We therefore agree with the District Court that appellee may demand a jury trial for her suit if there is enough evidence to support an inference that Congress intended to provide for jury trials in ADEA actions against the Government. Our review of the statute and legislative history persuades us that Congress did so intend.

First, we agree with appellee that the very fact that Congress gave jurisdiction over ADEA suits against the federal government to the District Courts rather than the Court of Claims supports the inference that there is a right to jury trial in such cases. As a leading authority has stated:

> Congress may confer jurisdiction of *actions against the United States* upon a district court sitting as a court of law (or equity), as a court of claims, and as a court of admiralty. And the particular grant of jurisdiction will determine the method of trial, court or jury, in the absence of some express pro-

> vision dealing with the method of trial. *Thus, absent a provision as to the method of trial, a grant of jurisdiction to a district court as a court of law carries with it a right of jury trial.* * * *

5 J. MOORE, *supra*, ¶ 38.32[2] at 236 (emphasis added; footnotes omitted); *accord*, 9 C. WRIGHT & A. MILLER, *supra*, § 2314 at 69 n.43. The Supreme Court's conclusions in *United States v. Pfitsch*, *supra*, and *Law v. United States*, *supra*, that actions against the Government could be tried to a jury were based on this reasoning.

Our belief that Congress intended to provide for jury trials is strengthened by Congress' choice of language in drafting the statutory provision. Congress used the term of art *"legal* and equitable relief" (emphasis added) in authorizing actions against the Government under Section 15(c), 29 U.S.C. § 633a(c), the same term it employed in authorizing actions against private employers under Section 7(c), 29 U.S.C. § 626(c). As appellee points out, the Supreme Court held in *Lorillard v. Pons*, *supra*, that the use of this term of art indicates an intention to provide for jury trials. To be sure, *Lorillard* involved a suit against a private employer. However, we must assume that Congress meant to confer the same rights when it used the same term in authorizing suits against the Government. Therefore, we may infer that, by authorizing "legal * * * relief" in ADEA actions against the Government, Congress was exercising its power to place such suits within the class of suits to which the Seventh Amendment jury trial guarantee applies. *Cf. Galloway v. United States*, *supra*, 319 U.S. at 388-389 ("Whatever force the [Seventh] Amendment has [in a suit against the Government] * * * is because Congress, in the legislation cited, has made it applicable.") (footnote omitted).[6]

---

[6] Thus in our view the dissent misses the point when it suggests that the jury trial connotation of the term "legal

We are not persuaded by the claim by the Government (and the dissent) that the 1978 amendments to the ADEA show that Congress did not intend to allow jury trials in actions against the Government. Congress amended Section 7(c), 29 U.S.C. § 626(c), to expressly provide for jury trials in actions against private employers. Pub. L. No. 95-256 § 4, 92 STAT. 190, 95th Cong., 2d Sess. (April 6, 1978). The Government and the dissent suggest that if Congress had intended to allow jury trials against the Government, it would also have amended Section 15(c), 29 U.S.C. § 633a(c). However, the legislative history of the amendment and the context in which it was enacted demonstrate that Congress was merely acting to reaffirm its intention to provide for jury trial whenever the issue was in doubt.

The jury trial issue was raised on the floor of the Senate after the House had already passed the bill. Senator Kennedy offered the amendment on October 19, 1977 —before *Lorillard* was decided. He noted that three of the four circuits that had considered the issue had ruled in favor of jury trials, that the amendment would clarify the issue, and that jury trials were particularly appropriate in age discrimination cases.[6] The amendment

---

* * * relief" is inapplicable in this case because the Seventh Amendment does not apply to suits against the Government. Dissenting opinion, —— F.2d at —— (p. 10). Congress undoubtedly can, and in this case did, authorize "legal relief" in actions against the United States.

[6] Senator Kennedy observed:

> [J]uries are more likely to be open to the issues which have been raised by the plaintiffs. Sometimes, a judge may be slightly callous, perhaps because he is protected by life tenure, or because he is somewhat removed from the

was immediately adopted without debate. The bill was reported by the Conference Committee shortly after *Lorillard* was decided. The Conference Committee adopted the Senate amendment, and indeed expanded the amendment to provide for jury trials in actions for liquidated damages, an issue that the Supreme Court had left open in *Lorillard*.[7]

Thus what we see is Congress reiterating its belief in the appropriateness of jury trials in ADEA actions and acting to confirm the right whenever doubt appeared—first when there was conflict among the circuits on the jury trial issue, and later to resolve the question left open by *Lorillard*. The legislative history of the amendment speaks only in terms of confirming the right to jury trials in age discrimination cases. No attempt was made to draw a distinction between public and private employers.[8] That only Section 7(c) was amended is easily explained by the fact that the cases which prompted congressional action were brought against private employers.

Our reading of the legislative history of the 1978 amendment is consonant with a statement placed in the Congressional Record on September 5, 1979 by Congressman Pepper, Chairman of the House Committee on Aging and a member of the Conference Committee on the 1978 amendments to the ADEA. Congressman Pepper stated:

> Those who participated in the House and Senate debates [on the amendment] would be surprised to

---

usual employer-employee relationship. The jury may be more neutral in such circumstances.

* * * *

It seems to me to be wise to insure that particular protection to those who are subject to age discrimination.

123 CONG. REC. S17297 (daily ed. Oct. 19, 1977).

[7] H.R. Rep. No. 95-950, 95th Cong., 2d Sess. 13-14 (1978).

[8] *Id.*; *see* note 5 *supra*.

> learn that legislative efforts to confirm the right to a jury trial have been construed as a denial of that right. It would be indefensible to deny Federal employees the right to a jury trial. Under any legislative enactment in the field of civil rights, the Federal Government should be the leader not a grudging participant. * * * As chairman of the Committee on Aging, I will continue to watch developments in this area, and will ask for further delineation of the right of Federal employees to a jury trial if conflicting judicial interpretations are not resolved in favor of a jury trial.

125 CONG. REC. E4258 (daily ed. Sept. 9, 1979).

IV

The issue presented by this case is whether an employee who brings an ADEA action against the federal government may demand a jury trial for her suit. We agree with the District Court that a congressional intention to confer a right to jury trial in such cases may be inferred from the language and legislative history of the ADEA.

Accordingly, the judgment of the District Court is

Affirmed.

TAMM, *Circuit Judge, dissenting*: The majority infers from several legislative actions a congressional intent to give federal plaintiffs a jury trial in ADEA actions. I believe this intent is anything but clear. I therefore respectfully dissent.

I.

The seventh amendment states that "in Suits at common law, . . . the right of trial by jury shall be preserved . . . ." This provision of the Bill of Rights guarantees a jury trial for private parties in most federal civil actions. *See, e.g., Ross v. Bernhard*, 396 U.S. 531 (1970). By its very terms, however, the amendment does not apply to all cases but only to those arising under common law; thus actions in equity or admiralty are tried to a judge. At common law, a suit could not be maintained against the government due to its sovereign immunity; therefore, any action in which the government waives its immunity is not a suit at common law within the meaning of the amendment. *Galloway v. United States*, 319 U.S. 372, 388-89 (1943).

As the Supreme Court has stated, "It long has been established . . . that the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Thus, when the government does consent to be sued, "there is a right to a jury trial . . . only if a statute, expressly or by fair implication so provides." 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2314, at 69 (1971) (footnote omitted). *See also* 5 MOORE'S FEDERAL PRACTICE ¶ 38.31[2], at 236 (2d ed. rev. 1971). In actions against the government under the ADEA, then, we must examine the Act's legislative history to see if Congress, in waiving sovereign immunity

to permit an ADEA action, intended also to submit the government to jury trials.

II.

Congress passed the ADEA in 1967 "to promote the employment of older workers based on their ability . . . through an education and information program to assist employers and employees in meeting employment problems . . . and through the utilization of informal and formal remedial procedures." H.R. REP. No. 805, 90th Cong., 1st Sess. 1, *reprinted in* [1967] U.S. CONG. CODE & AD. NEWS 2213, 2214. For the most part, Congress applied the enforcement provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1976), to the ADEA: "the powers, remedies, and procedures provided in section 211(b), 216 (except for subsection (a) thereof), and 217 of [title 29]" govern violations of the ADEA. *Id.* § 626(b) (1976). These provisions permit private actions by aggrieved employees "for such legal and equitable relief as will effectuate the purposes of [the ADEA]," 29 U.S.C.A. § 626(c)(1) (West Supp. 1979). The Secretary of Labor may also bring suits to halt discriminatory practices, 29 U.S.C. § 626(b) (1976).

As originally passed, the ADEA specifically excluded federal employees from coverage.[1] *See* ADEA, Pub. L. No. 90-202, § 11, 81 Stat. 602 (1967) (codified at 29 U.S.C. § 630(b) (1976)). In 1974, Congress amended the ADEA,[2] adding a new provision to deal specifically

---

[1] The FLSA originally excluded all public employees from coverage. *See* FLSA, ch. 676, § 3(d), 52 Stat. 1060 (1938) (amended 1974).

[2] Congress also redefined "employer" in the FLSA to include "public agencies," thus extending the FLSA to cover all federal, state, and local governmental units. *See* 1974

with age discrimination against federal employees. *See* Fair Labor Standards Amendments of 1974 (1974 FLSA Amendments), Pub. L. No. 93-259, § 28(b)(2), 88 Stat. 55 (1974) (codified at 29 U.S.C. § 633a (1976)).[3] It

---

FLSA Amendments, § 6(a)(1), (6) (codified at 29 U.S.C. § 203(d), (x) (1976).

Passage of the Fair Labor Standards Amendments of 1974 capped a three-year effort to raise the minimum wage and to increase the coverage of the FLSA and ADEA. The original bill, S. 1861, 92d Cong., 2d Sess., 118 CONG. REC. 23952 (1972), did not contain provisions extending the ADEA to federal workers. During consideration of this bill, Senator Lloyd Bentsen introduced an amendment to include federal and state workers under the ADEA. The Senate Committee on Labor and Public Welfare adopted the amendment and included it in the bill sent to the Senate floor. *See* S. REP. No. 842, 92d Cong., 2d Sess. 45 (1972). The bill passed the Senate but died when the House refused to meet in conference to resolve differences over the minimum wage provisions of its bill. In 1973 the Senate again passed a bill, S. 1861, 93d Cong., 1st Sess., 119 CONG. REC. 24335 (1973), to increase the minimum wage and to extend the provisions of the ADEA and FLSA to federal employees. House conferees insisted, however, on deleting the ADEA amendments as not germane. H.R. REP. No. 413, 93d Cong., 1st Sess. 33 (1973) (conference report); 120 CONG. REC. 4706 (1974) (statement of Sen. Frank Church). The President vetoed the bill as inflationary. Finally, after extensive debate, in 1974 Congress passed and the President signed the 1974 FLSA Amendments.

[3] This section states in part:

> (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Govern-

ment having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

[Continued]

authorizes the Civil Service Commission [4] to enforce the ban on age discrimination through "appropriate remedies, including reinstatement or hiring of employees with or without backpay." 29 U.S.C. § 633a(b). In addition, any aggrieved federal employee "may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." *Id.* § 633a(c).

The legislative history of the 1974 FLSA Amendments does not mention the issue of jury trials under section 633a. Most of the debate on the 1974 FLSA Amendments dealt with its minimum wage provisions. Comments on the ADEA involved the need to extend its protection to federal and state workers.[5] Indeed, the committee report on the 1974 FLSA Amendments made clear that the original exclusion of the federal government from coverage under the ADEA was inadvertent:

> The Committee recognizes that the omission of government workers from the Age Discrimination in Employment Act did not represent a conscious decision by the Congress to limit the ADEA to employment in the private sector. It reflects the fact, that in 1967, when ADEA was enacted, most government employees were outside the scope of the

---

[3] [Continued]

> (c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

29 U.S.C. 633c (1976).

[4] The Equal Employment Opportunity Commission assumed the duty of enforcing the ADEA in 1978. *See* Reorg. Plan No. 1 of 1978, § 2, 43 Fed. Reg. 19807 (1978), *reprinted in* 5 U.S.C.A. app. (West Supp. 1979).

[5] *See, e.g.*, 119 CONG. REC. 24807 (1973) (remarks of Sen. Frank Church).

> FLSA[,] and the Wage Hour and Public Contracts Divisions of the Department of Labor, which enforces the Fair Labor Standards Act, were assigned responsibility for enforcing the Age Discrimination in Employment Act.

S. REP. No. 690, 93d Cong., 2d Sess. 55 (1974). *Accord*, S. REP. No. 300, 93d Cong., 1st Sess. 56 (1973); S. REP. No. 842, 92d Cong., 2d Sess. 45 (1972).

The history of the 1974 FLSA Amendments indicates that Congress wanted federal employees to have the same protections from age discrimination as their counterparts in the private sector. Giving the same protection, however, does not necessarily mean Congress intended to establish the same procedures for federal employees to enforce those protections. With jury trials, congressional waiver of immunity can occur only by express statement or by clear implication; as noted above, however, Congress did not discuss jury trials for federal employees when considering the 1974 FLSA Amendments. This silence, therefore, must be construed as demonstrating that Congress did not intend federal employees to have jury trials under the ADEA.

The establishment of a separate legislative scheme for federal workers under the ADEA, 29 U.S.C. § 633a, supports this conclusion that Congress did not intend federal workers to have jury trials.[6] Congress entrusted the su-

---

[6] Senator Lloyd Bentsen introduced S. 3318, 92d Cong., 2d Sess., 118 CONG. REC. 7745 (1972), to extend the ADEA to federal employees. This separate bill would have amended the definition of employer in 29 U.S.C. § 630(b) to include the federal and state governments. Such an amendment would have placed the federal government in the same position as all other employers subject to the ADEA. Senator Bentsen, later that term, introduced his amendment to the FLSA Amendments bill. Rather than altering the definition of employer, this amendment established a separate section with special procedures for dealing with age discrimination in the

pervision of the age discrimination program in the federal government to the Civil Service Commission and not to the Department of Labor, the agency supervising the ADEA in the private sector. Congress authorized the Commission to promulgate rules and receive reports from government agencies detailing efforts to fight age discrimination. *Id.* § 633a(b)(1). The Commission established an administrative grievance procedure, *see* 5 C.F.R. § 713.501-.521 (1978), to resolve age discrimination complaints without judicial intervention. These administrative procedures are not available to private-sector employees and they demonstrate that, although Congress wanted to grant the same protection to both federal and private employees, it did not mandate the same remedial procedures.

By 1978, a conflict had developed in the federal courts of appeals over the right to a jury trial in ADEA actions by employees in the private sector.[7] To resolve this controversy, Senator Edward Kennedy introduced an amendment to the Age Discrimination in Employment Amendments of 1978 (1978 ADEA Amendments), Pub. L. No. 95-256, 92 Stat. 189 (codified in scattered sections of 29 U.S.C.A. (West Supp. 1979)), to ensure jury trials for private plaintiffs under section 626. *See* 123 CONG. REC. S17296-97 (daily ed. Oct. 19, 1977). While the legislation still was pending, the Supreme Court handed down

---

government. The use of the separate provision for federal employees under the ADEA, rather than the simple change in the definition of employer under S. 3318, indicates that Congress contemplated different procedures for the two programs.

[7] *Compare* Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834 (3d Cir. 1977) (right to jury trial), *cert denied*, 434 U.S. 1022 (1978), *and* Pons v. Lorillard, 549 F.2d 950 (4th Cir. 1977) (same), *aff'd*, 434 U.S. 575 (1978), *with* Morelock v. NCR Corp., 546 F.2d 682 (6th Cir. 1976) (no right to jury trial), *vacated and remanded*, 435 U.S. 911 (1978).

its decision in *Lorillard v. Pons*, 434 U.S. 575 (1978), which held in a private-sector case that Congress indeed had intended plaintiffs to have jury trials in ADEA actions to recover lost wages. House and Senate conferees nevertheless incorporated the jury trial provision in the final version of the 1978 ADEA Amendments and clarified an issue left unresolved in *Lorillard* by granting private-sector employees a right to jury trials when liquidated damages were involved. H.R. REP. NO. 950, 95th Cong., 2d Sess. 13-14, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 528, 535. *See* 1978 ADEA Amendments § 4(a) (codified at 29 U.S.C.A. § 626(c)(2) (West Supp. 1979)).

Despite its reexamination of the jury trial provisions, Congress did not amend section 633a, the corresponding section giving federal workers the right to bring civil actions for age discrimination against the United States. As the Fifth Circuit has noted in a related context, "Where Congress has carefully employed a term in one place but excluded it in another, it should not be implied where excluded." *J. Ray McDermott & Co. v. Vessel Morning Star*, 457 F.2d 815 (5th Cir.) (en banc), *cert. denied*, 409 U.S. 948 (1973). *See also Diamond Roofing Co. v. OSHRC*, 528 F.2d 645 (5th Cir. 1976). The failure to adopt a parallel amendment indicates that Congress did not intend to extend its waiver of sovereign immunity to permit jury trials for federal employees.[8]

---

[8] The failure to amend § 633a cannot be deemed inadvertent. The Kennedy amendment, though adopted on the Senate floor with little debate, received careful consideration in the conference committee, which altered it to clarify the right to jury trial when liquidated damages were involved. *See* H.R. REP. NO. 950, 95th Cong., 2d Sess. 13-14, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 536. The conference committee also altered § 633a, amending subsection (a) and adding subsections (f) and (g) to authorize studies of age discrimination. *Id.* In amending both sections as it did,

III.

Appellees also argue, and the majority agrees, that *Lorillard v. Pons* supports a right to jury trial for federal plaintiffs under the ADEA. This reliance is misplaced. *Lorillard* arose in the private sector and involved section 626, which adopts FLSA remedies. *See* p. 3 *supra*. The Court concluded that Congress intended plaintiffs under section 626—by definition, employees in the private sector only[9]—to have the same rights as plaintiffs under the FLSA, who may insist on jury trials.[10] At no time did the Court discuss federal employees, section 633a, or congressional waiver of sovereign immunity. This right to demand a jury trial does not extend to federal employees suing under section 633a, for the waiver of sovereign immunity to allow jury trials for federal plaintiffs presents different concerns. Juries may be too sympathetic toward plaintiffs in cases where the federal government is the defendant. Congress has noted this problem when considering bills authorizing jury trials against the government: "The primary objection to granting jury trials in suits against the United States is that juries, in considering possible sums to be awarded the plaintiff, might tend to be overly generous because of the virtually unlimited ability of the Government to pay the verdict." H.R. REP. NO. 659, 83d Cong., 2d Sess. 3 *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 2716, 2718 (amending 28 U.S.C. § 2402 to allow jury trials in suits by taxpayers for tax refunds from the federal gov-

---

Congress could not have overlooked the need to amend § 633a(c) to allow jury trials for government employees if it had so wished.

[9] *See* 29 U.S.C. § 630(b) (1976) (excluding the federal government from ADEA's definition of employer).

[10] *See, e.g.*, Lewis v. Times Publishing Co., 185 F.2d 457 (5th Cir. 1950).

ernment). Trying a case to a judge removes this potential bias.

The majority further observes that the Court in *Lorillard* based its decision in part on the presence of the term "legal . . . relief" in section 626(b), which the Court believed suggested a congressional desire for jury trials. *See* 434 U.S. at 585. The majority contends that the appearance of "legal . . . relief" in section 633a(c)(1) similarly supports a jury trial for federal employees. The *Lorillard* Court, however, based its findings of congressional intent on the meaning of the term under the seventh amendment.[11] As noted above, the seventh amendment does not apply in this case, for common-law or "legal" remedies cannot lie against the federal government. *See* pp. 1-2 *supra*. Thus, reliance on Congress's use of "legal . . . relief" in section 633a would be inappropriate because of the term's relationship to the seventh amendment.

Reliance on *United States v. Pfitsch*, 254 U.S. 547 (1921), is equally unavailing. *Pfitsch* involved "the nature of the jurisdiction conferred upon the District Court by § 10 of the Lever Act [c. 53, 40 Stat. 276 (1917)]," *id.* at 549, a wartime measure authorizing seizure of supplies for the American effort in World War I. The Court, after examining the legislative history of the Lever Act, concluded that Congress had intended district courts to have sole jurisdiction under section 19 rather than concurrent jurisdiction with the Court of Claims. Given this exclusive jurisdiction, an appeal from the district court should have gone to the Circuit Court of Appeals rather than the Supreme Court on direct writ of error. The Court therefore dismissed the appeal for want of jurisdiction.

---

[11] The Court stated: "In cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to jury trial." 434 U.S. at 583.

In its decision, the Court in dictum indicated that exclusive jurisdiction in the district court under the Lever Act would include "incidentally" a right to jury trial against the federal government. *Id.* at 550. The Court mentioned jury trials only in reaching its conclusion about the type of jurisdiction Congress had conferred. It neither discussed nor decided a plaintiff's right to jury trial per se. These few comments on the right to a jury trial under the Lever Act do not mean that Congress waives the government's immunity to jury trial anytime it confers sole jurisdiction on the district courts. The "fair implication" of the right to jury trial as found in *Pfitsch*, 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2314, at 69 & n.43 (1971), *quoted* at p. 2 *supra*, cannot be drawn in this case, for Congress established a separate enforcement scheme for federal employees under the ADEA and then failed to alter that scheme to allow jury trials for federal plaintiffs when it provided that right to private-sector employees in 1978.[12]

IV.

Sovereign immunity, though criticized, remains a viable doctrine. *See, e.g., Fitzgerald v. United States Civil Service Commission*, 554 F.2d 1186 (D.C. Cir. 1977) (Bazelon, C.J.). Jury trials, though favored, are not always permitted.[13] This favor does not extend to suits against the government. "[W]hile statesmen and jurists are often wont to extol the virtues of jury trial, they are

---

[12] In addition, *Pfitsch* supplies the sole support for the assertions made in 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2314, and 5 MOORE'S FEDERAL PRACTICE ¶ 38.31[2], that jurisdiction in the United States District Court against the federal government carries with it the right to jury trial.

[13] *Cf.* 28 U.S.C. § 2402 (1976) (any action brought under Federal Tort Claims Act will be tried to the court without jury).

not accustomed to extend the virtues to actions against the United States, either in the Court of Claims or in the district courts." 5 MOORE'S FEDERAL PRACTICE, ¶ 38.31 [2], at 234-35 (footnotes omitted). Congress has had ample opportunity to afford federal employees the right to jury trial under the ADEA but has failed to do so. We should not apply what it has so far denied.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0867

ALICE NAKSHIAN, PLAINTIFF

v.

W. GRAHAM CLAYTOR, JR., DEFENDANT

MEMORANDUM

Plaintiff is an older woman who has been employed as a secretary and clerk by the Navy Department for over thirty years. She has sued the Navy for alleged age discrimination under the Age Discrimination in Employment Act (ADEA). Plaintiff requests a jury trial for her suit, and defendant has moved to strike the request. The court must now determine whether plaintiff has a right to a jury trial under the ADEA in a suit against the government.[1]

I. RIGHT TO JURY TRIAL IN PRIVATE ADEA SUITS

The Supreme Court recently established that plaintiffs have the right to demand a jury trial for ADEA suits brought against private employers (hereinafter, "private ADEA suits"). *Lorillard v. Pons*, ___ U.S. ___, 98 S.Ct.

---

[1]This question is one of first impression. Although the government conceded the right to a jury trial in an ADEA suit against the Department of Labor, *Carter v. Marshall*, C.A. No. 77-365 (D.D.C. 1978), the government apparently has adopted the policy of no longer conceding the issue.

866 (1978). The Court based its conclusion on statutory grounds. It determined that Congress intended to grant plaintiffs a jury right when it enacted 29 U.S.C. § 626(c). The Supreme Court noted that the ADEA's enforcement provisions were modeled after those of the Fair Labor Standards Act (FLSA). Because the FLSA established the right to a trial by jury in private actions, the Court inferred that Congress likewise intended the ADEA to provide such a jury right. The Supreme Court also pointed out that the ADEA empowers a court to grant "*legal* or equitable relief" [29 U.S.C. § 626(c)] (emphasis added). The explicit use of the term of art, "legal . . . relief" manifests Congress' intention to provide a jury trial right, according to the Court. *Id.* at 871–72.

Congress codified the *Lorillard* result by explicitly amending the ADEA to grant plaintiff a jury trial right in private ADEA suits. § 7(c) of the ADEA was amended, in 1978, to include the following paragraph:

> (2) In an [ADEA] action . . . a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

See Act of April 6, 1978, Pub. L. No. 95–256, 92 Stat. 189 (1978).

II. RIGHT TO JURY TRIAL IN ADEA SUITS AGAINST THE GOVERNMENT

When originally enacted, the ADEA did not establish the right of persons to sue the federal government for age discrimination. Congress' 1974 amendments to the Act, however, established such a right. In doing so, Congress used the exact same language that it had previously employed to authorize private ADEA suits:

> Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for any such legal or equitable relief as will effectuate the purposes of this chapter.

Compare 29 U.S.C. § 633a(c) *with* 29 U.S.C. § 626(c).

The question now before the court is whether the above quoted language gives plaintiffs a right to demand a jury trial in ADEA suits brought against the federal government.

Application of the *Lorillard* Court's reasoning suggests that a jury trial right exists for suits brought against the government. First, § 633a(c) uses the same "legal . . . relief" language that persuaded the Supreme Court to conclude that § 633a(c)'s companion provision, § 626(c), permits jury trials for private ADEA suits. Second, Congress' 1974 amendments to the Act made the ADEA generally applicable to the federal government, with few changes.[2] Indeed, the use of the exact same language in § 633a(c) as in § 626(c) indicates that Congress intended suits against the government to be on equal footing with private ADEA suits. Thus, an implied jury right for private ADEA actions is equally applicable for government ADEA suits. Third, if Congress had indended its consent to ADEA suits to be limited to non-jury trials, it could have easily said as much. Congress' failure to assert continuing sovereign immunity with respect to ADEA *jury* trials implies its abandonment of that immunity. At the least, this court is unwilling to deprive plaintiffs who sue government entities instead of private employers of their right to

---

[2]The drafters of the 1974 amendments did not intend to alter substantially the ADEA enforcement scheme for suits against the government. Instead, Congress indicated that it simply meant to "expand the coverage of the Act to Federal, State, and local employees." H.R. Rep. No. 93-913, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 2811, 2860.

a jury trial without Congress' explicit refusal to grant such a right.

The 1978 amendments to the ADEA have introduced some confusion into this otherwise clear conclusion that plaintiffs have the right to a jury trial in ADEA suits against the government. As mentioned above, those amendments included an express addition to 29 U.S.C. § 626(c) [§ 7(c) of the ADEA] which codified *Lorillard's* holding that private ADEA litigants have the right to demand a jury trial. Congress did not, however, similarly amend § 626(c)'s companion provision for suits against the government, § 633a(c). The United States therefore argues that Congress did not intend to allow jury trials for ADEA suits against the government.

At first blush, the United States' position seems persuasive. Congress' failure to amend § 633a(c) to explicitly allow jury trials for government ADEA suits arguably indicates that it did not want to "extend" the jury trial right to those suits. This argument fails, however, for three reasons. First, the legislative history, though vague, indicates that Congress did not intend its explicit authorization of ADEA jury trial to apply only to private ADEA suits, and not those lodged against the government. The history speaks only in general terms about the right of a jury trial for ADEA suits.[3] It does not reflect a conscious decision by Congress to limit *Lorillard* to private ADEA suits. Second, the clear, unamended language of § 633a(c) compels a conclusion that plaintiffs have a jury trial right in government ADEA suits. Specifically, § 633a(c) speaks in terms of "legal . . . relief." As noted by the Lorillard Court:

---

[3]H. Conf. Rep. 95-950, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News at 1007.

> The word "legal" is a term of art: In cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to jury trial. 98 S.Ct. at 871.

Third, Congress' silence should not be interpreted to deprive plaintiffs of the cherished right to a jury trial. As mentioned above with reference to the 1974 ADEA amendments, and as demonstrated by the *Lorillard* Court, the failure to explicitly provide for jury trials does not compel the conclusion that such trials are not permitted on grounds of sovereign immunity or statutory interpretation. To so hold would ignore the spirit of the 1978 amendments to the ADEA, the language of § 633a(c), and the importance of the right to a trial by jury.

The court therefore concludes that Congress intended to permit plaintiffs suing the government under the ADEA to demand jury trials.[4]

So ordered.

/s/ _____
LOUIS F. OBERDORFER
United States District Judge

Date: MARCH 7, 1979

---

[4]Because the case can be disposed of on statutory grounds, the court does not find it necessary to determine whether plaintiff might have a Seventh Amendment right to a jury trial in this case.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78–0867

ALICE NAKSHIAN, PLAINTIFF,

v.

W. GRAHAM CLAYTOR, JR., DEFENDANT.

ORDER

In accordance with the Memorandum filed this day by the court, it is this 8th day of March, hereby

ORDERED: That defendant's motion to strike plaintiff's demand for a jury trial be, and is hereby, DENIED.

/s/ _____
LOUIS F. OBERDORFER
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-0867

ALICE NAKSHIAN, PLAINTIFF,

v.

W. GRAHAM CLAYTOR, DEFENDANT.

SUPPLEMENTAL MEMORANDUM

On March 7, 1979, the court entered a Memorandum and Order that denied defendant's motion to strike plaintiff's jury demand. On that same date, defendant filed an additional memorandum vigorously opposing plaintiff's request for a jury trial in this Age Discrimination suit.

Defendant chooses to emphasize two arguments in its latest papers. First, it contends that the Supreme Court's reasoning in *Lorillard v. Pons*, ___ U.S. ___, 98 S.Ct. 866 (1970) does not support a finding of a jury trial in ADEA suits against the government. Second, defendant repeats its earlier arguments that Congress has not waived sovereign immunity for purposes of jury trials against the government.

Applicability of the FLSA. Defendant asserts that the *Lorillard* Court based its finding of a jury trial right for ADEA suits against private employers on the similar right existing under the Fair Labor and Standards Act ("FLSA"). It now argues that the FLSA does not allow jury trials for suits against the government, and thus the ADEA similarly is not meant to permit jury trials for such suits.

Defendant's reasoning contains two fallacies. First, the *Lorillard* Court did not depend solely on the FLSA to hold that a similar right adheres for the ADEA. Indeed, the Court emphasized that the language of the ADEA, calling for "legal . . . relief," demonstrates an intent to create a jury trial right. Second, it was not until 1974 that Congress extended the ADEA to suits against the government. The FLSA may have been useful as a guide in divining Congress' 1967 intentions when it enacted 1974 amendments. A much more reliable guide, in the opinion of the court, is the language of the 1974 amendments which provides for "legal . . . relief" against the government.

Sovereign Immunity. Defendant repeats its argument that because the United States has not explicitly permitted jury trials in ADEA suits, no jury trial right exists.

The defendant is correct, of course, in asserting that the doctrine of sovereign immunity generally bars suits against the United States without its consent. *McElrath v. United States*, 102 U.S. 426 (1880). The United States also can dictate, to some extent, the terms of suit. *Id.* The defendant goes too far however, when it asserts that unless Congress explicitly allows jury trials in suits against it, such trials necessarily are barred. The courts obviously can, and have, inferred a Congressional intention to allow jury trials in the absence of explicit authorization. *See, e.g., Lorillard v. Pons, supra; United States v. Pfitsch*, 256 U.S. 547 (1921). Indeed, courts should not be reluctant to find the right to a jury trial in suits against the United States. Once the government has consented to suit, its silence or ambiguity about whether plaintiffs can demand a jury trial should not be grounds for the denial of such trials. Courts have a responsibility to take a close look at

Congressional intent and, if necessary, at the Constitutional right to a jury trial, before they hold that plaintiffs are not entitled to trials by a jury of their peers. The doctrine of sovereign immunity does not absolve them from this responsibility.

/s/ _____
LOUIS F. OBERDORFER
United States District Court

MARCH 15, 1979

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1979

Civil Action No. 78-0867

No. 79-1672

ALICE NAKSHIAN

v.

W. GRAHAM CLAYTOR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NAVY, ET AL., APPELLANTS

Appeal from the United States District Court for the District of Columbia.

BEFORE: WRIGHT, Chief Judge; BAZELON, Senior Circuit Judge, and TAMM, Circuit Judge

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion of this Court filed herein this date.

Per Curiam

For the Court

/s/ _____

GEORGE A. FISHER
Clerk

Dated: FEBRUARY 19, 1980
Opinion for the Court filed by Chief Judge Wright.
Dissenting opinion filed by Circuit Judge Tamm.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1979

Civil Action No. 78-0867

No. 79-1672

ALICE NAKSHIAN

v.

W. GRAHAM CLAYTOR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NAVY, ET AL., APPELLANTS

BEFORE: WRIGHT, Chief Judge; BAZELON, Senior Circuit Judge; and TAMM, Circuit Judge

ORDER

Upon consideration of appellants' (federal) petition for rehearing, it is

ORDERED, by the Court, that appellants' aforesaid petition for rehearing is denied.

Per Curiam

For the Court:

/s/ _____

GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1979

Civil Action No. 78-0867

No. 79-1672

ALICE NAKSHIAN

v.

W. GRAHAM CLAYTOR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NAVY, ET AL., APPELLANTS

BEFORE: WRIGHT, Chief Judge; McGOWAN, TAMM, ROBINSON, MacKINNON, ROBB, WILKEY, WALD, MIKVA, and EDWARDS, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by appellants' (federal) having been transmitted to the full Court and a majority of judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, *en banc*, that appellants' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For The Court:

/s/ _____

GEORGE A. FISHER
Clerk

Circuit Judges Tamm, MacKinnon, Robb, and Wilkey would grant appellants' suggestion for rehearing *en banc*.

APPENDIX F

STATUTORY PROVISIONS INVOLVED

Section 7 of the Age Discrimination in Employment Act, 29 U.S.C. 626, provides in pertinent part:

> (b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion
>
> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

Section 15 of the Age Discrimination in Employment Act, 29 U.S.C. 633a, provides:

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Opportunity Employment Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Opportunity Employment Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Opportunity Employment Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Opportunity Employment Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of

discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions of personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

No. 80-242

Supreme Court, U.S.
FILED
OCT 22 1980

In The

Supreme Court of the United States

October Term, 1980

EDWARD HIDELGO, SECRETARY OF THE NAVY,

Petitioner,

vs.

ALICE NAKSHIAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PATRICIA J. BARRY
Attorney for Respondent
1066 National Press Building
Washington, D.C. 20045
(202) 347-6463

4141 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 840-9494 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

QUESTION PRESENTED

Whether a plaintiff in an action against the United States under Section 15(c) of the Age Discrimination in Employment Act, 29 U.S.C. §633a(c), is entitled to trial by jury?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Citations iii

Introduction 1

Reasons For Denying the Writ:

I. This Court recently decided the question of whether individuals, filing civil actions under the Age Discrimination in Employment Act ("ADEA") are entitled to jury trials in *Lorillard v. Pons,* 434 U.S. 575 (1978). 2

II. The issue raised in the petition affects a very small number of cases litigated in the United States, and affects only a very small percentage of the cases in which the government is involved. 7

III. There is no conflict of decisions by courts of appeal on this issue. 9

IV. The position of the Solicitor on this issue is that the federal government as an employer should be treated differently, and has, in the words of Judge Tamm, with respect to jury trials, "special concerns." 10

V. The government has not always opposed jury trials in federal ADEA cases. 12

VI. District Court jurisdiction implies a right to jury trial. 13

Contents

Page

VII. There is no presumption against jury trials in actions involving the United States. 17

VIII. A fair statutory interpretation of the ADEA infers jury trials for federal ADEA cases. 22

Conclusion 28

TABLE OF CITATIONS

Cases Cited:

Atlas Roofing Co. v. Occupational Safety and Health Administration, 430 U.S. 442 (1977) 16

Beacon Theatres v. Westover, 359 U.S. 500 (1959) 26

Carlson v. Green, ____ U.S. ____, 100 S. Ct. 1468 (1980) ... 21

Carter v. Marshall, 457 F. Supp. 38 (D.D.C. 1978) 5, 13

Carter v. Marshall, C.A. No. 77-0365 15

Chisholm v. Georgia, 2 Wall. 419 (1972) 17

Crouch v. United States, 8 F. 2d 435 (4th Cir. 1925) 13

Curtis v. Loether, 415 U.S. 189 (1974) 19, 26

Dairy Queen v. Wood, 369 U.S. 469 (1962) 26

Galloway v. United States, 319 U.S. 372 (1943) 9

Contents

Page

Harris v. U.S. Department of the Treasury, 489 F. Supp. 476 (N.D. Ill., 1980) 10, 22, 23, 27

La Chapelle v. Owens-Illinois, Inc., 513 F. 2d 286 (5th Cir. 1975) 3

Law v. United States, 266 U.S. 494 (1925) 13, 17

Leimer v. Woods, 196 F. 2d 828 (8th Cir. 1952) 20, 26

Lorillard v. Pons, 434 U.S. 575 (1975) 2, 4, 5, 6, 7, 9, 12, 20, 22, 23, 24, 26

McElrath v. United States, 102 U.S. 426 (1880) 20, 21

Moysey v. Andrus, 21 EPD 30,488 (D.D.C. 1979) 3

Pernell v. Southall Realty, 416 U.S. 363 (1974) 26

United States v. McGovern, 299 F. 302 (9th Cir. 1924) 13

United States v. Pfitsch, 256 U.S. 547 (1921) 13, 15, 17

United States v. Testan, 424 U.S. 392 (1976) 21

Wickwire v. Reincke, 275 U.S. 101 (1927) 26

Statutes Cited:

Age Discrimination in Employment Act:

§7 24

Contents

	Page
§7(b)	3
§7(c)	3
§7(c)(1)	4
§15(c)	3, 4
§15(f)	2, 3, 4, 23
29 U.S.C. §211(b)	3
29 U.S.C. §216	3
29 U.S.C. §216(b)	3
29 U.S.C. §217	3
29 U.S.C. §626(c)	2
29 U.S.C. §626(c)(1)	4
29 U.S.C. §626(c)(2)	23
29 U.S.C. §630(b)	4
29 U.S.C. §633a(c)	i, 4, 25, 26
29 U.S.C. §633a(a-g)	4
29 U.S.C. §663a(c)	13

Contents

Page

Equal Pay Act:

29 U.S.C. §206(1-4) 12

Fair Labor Standards Amendments of 1974, Pub. L. 93-259, 93d Cong., 2d Sess., 88 Stat. 54 5

Fair Labor Standards Act, §3(d), 52 Stat. 1060 4

29 U.S.C. §203(e) 5

29 U.S.C. §216(b) 5

Emergency Price Control Act of 1942, Ch. 26, Section 205(e), 56 Stat. 23 21

Judiciary Act of 1789, Sections 9, 12 14

Reorganization Act No. 1 of 1978, 43 F.R. 19,807 (1978), reprinted in 92 Stat. 3781 12

29 U.S.C. §626(d) 12

Revision Act of 1948, Ch. 646, Section 39, 62 Stat. 992 14

28 U.S.C. §770 ..... 13, 14, 15, 26

Revised Statutes 566, 648 ..... 14, 15

28 U.S.C. §1346 21

Contents

Page

28 U.S.C. §1346(a)(1) 21

28 U.S.C. §1873 14

Historical & Revision Notes, 28 U.S.C.A. §1873 .....14, 15

28 U.S.C. §2402 21

28 U.S.C. §2409a 21

28 U.S.C. §2409a(e) 21

United States Constitution Cited:

Seventh Amendment 2, 3, 6, 20

Rules Cited:

Federal Rules of Civil Procedure:

Rule 38(a) 15, 26

Rule 38 15

Other Authorities Cited:

S. Rep. No. 93-690, 93d Cong., 2d Sess. 55 (1974) 6

H.R. No. 3214, 80th Cong., 2d Sess. (1948) 14

123 Cong. Rec. S17297 (daily ed. Oct. 19, 1977) 24

Page

H.R. Rep. No. 95-950, 95th Cong. 2d Sess. 13-14 (1978) 24

5 J. Moore, Federal Practice (2d ed. 1979) 16, 26

Annual Report of the Director, published by the Administrative Office of the United States Courts, for June 30, 1977; June 30, 1978; June 30, 1979; and June 30, 1980 . 8

Memorandum for United States Attorneys and Agency General Counsels from Attorney General Bell, August 31, 1977, p. 2 11

No. 80-242

In The

Supreme Court of the United States

October Term, 1980

EDWARD HIDALGO, SECRETARY OF THE NAVY,

Petitioner,

vs.

ALICE NAKSHIAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Patricia J. Barry, on behalf of respondent Alice Nakshian, respectfully opposes the petition for a writ of certiorari filed by the Solicitor of the United States on behalf of Edward Hidalgo, Secretary of the Navy, to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

The Question Presented for review is at page i of the Solicitor's petition and at page i of this brief. The Opinions

Below, Statement of Jurisdiction, Statutory Provisions Involved and Statement are found at pp. 1-4 of the Solicitor's petition and at Appendices A, B, C and F attached thereto.

REASONS FOR DENYING THE WRIT

I.

This Court recently decided the question of whether individuals, filing civil actions under the Age Discrimination in Employment Act ("ADEA") are entitled to jury trials in *Lorillard v. Pons,* 434 U.S. 575 (1978).

In *Lorillard,* this Court determined that employees bringing an ADEA suit against private, state or public employers were entitled to a jury trial, pursuant to §7(c) of the ADEA, 29 U.S.C. §626(c) (1976). This Court found such a right because of the use of the term of art "legal relief" in the wording of the statute. In this Court's view, the use of that term, "legal relief" provided further evidence of Congress' intention to provide for jury trials since it is settled that in cases in which legal relief is available and legal rights are determined the Seventh Amendment guarantees the right to jury trial. 434 U.S. at 583.

The same reasoning this Court applied in *Lorillard* has equal force when applied to federal ADEA cases, despite the Solicitor's claim to the contrary (Petition, 6-7, hereinafter "Pet.").

For the first time, the government raises a defense not raised in any of its memoranda or briefs at the trial or appellate levels below. The defense is that Section 15 of the ADEA is separate unto itself by the addition of Subsection (f) which provides that ". . . personnel actions in the federal government shall not be 'subject to, or affected by' any other provisions of the Act. (Citations omitted.)." (Pet. 6-7).

In alleging that §15(f) of the ADEA excludes federal employees from being covered by the provisions of §7 of the ADEA, the government is taking a position directly contradictory to the position it took in *Moysey v. Andrus,* 21 EPD ¶30,488 (D.D.C. 1979).

In that case, the government argued §7(b) of the ADEA applied to federal employees, therefore, making the provisions of 29 U.S.C. §§211(b), 216(b), 217 and Subsection (c) of §7 applicable to federal employees.

Thus, according to the government, federal employees seeking to certify class actions had to meet the "opt-in" requirement of §216, which the court found ". . . mutually exclusive with the Federal Rules regarding class actions. See *e.g., La Chapelle v. Owens-Illinois, Inc.,* 513 F. 2d 286, 289 (5th Cir. 1975)." *Id.* at p. 13,691.

While the government argued in *Moysey* that Section 7(b) [and, therefore, because of the language in Section 7(b), Section 7(c)] was applicable to federal ADEA cases, in the instant case, it reversed itself, making its legal reasoning contradictory and inconsistent.

The Solicitor goes on to conclude that ". . . [t]here is no occasion to construe Section 15(c) in any particular way in order to avoid a constitutional question, because the Seventh Amendment does not apply to suits against the federal government. Nor, for the same reason, can the word 'legal' be deemed a term of art as respects the availability of jury trials involving the federal government." (Pet. 7).

The Solicitor's reasoning is erroneous for several reasons:

First, even if one assumes that the language of Section 15(f) makes 29 U.S.C. §633a(a-g) complete in itself, one still has the provisions of §633a(c):

> "Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for *such legal or equitable relief as will effectuate the purposes of this chapter.*" (Emphasis added.)

This language is identical to the language found in Section 7(c)(1) except that the words "Federal district" are added to Section 15(c), and in Section 7(c)(1) there is a proviso added that the right of the individual to bring such action terminates if the EEOC brings an action on behalf of that individual.

Just as this Court found in *Lorillard* that Congress was deemed to be aware of what the term "legal relief" meant at the time it used that language in §626(c)(1), so it is deemed to have knowledge of what that term meant when it incorporated the identical language in §633(a)(c) without reservation.

Furthermore, the manner in which Congress made the federal government subject to the ADEA further supports the proposition that Congress intended identical court procedures for both federal and nonfederal employees as evidenced by the use of identical language in Sections 626(c)(1) and 633a(c).

As originally enacted, the ADEA did not protect employees of the federal government, which was expressly excluded from the definition of "employer" in Section 11(b) of the Act, 29 U.S.C. §630(b). Similarly, the Fair Labor Standards Act as enacted in 1938 did not cover federal employees. §3(d), 52 Stat. 1060.

In 1974, however, Congress simultaneously amended both the ADEA and the FLSA to extend their coverage to federal employees. Fair Labor Standards Amendments of 1974, Pub. L. 93-259, 93d Cong., 2d Sess., 88 Stat. 54, 58-59, 74-75. Federal employees were made subject to the FLSA by revising the definition of "employee" in Section 3(e) of that Act, 29 U.S.C. §203(e), to include them. In addition, the provision in Section 16(b) of the FLSA, 29 U.S.C. §216(b), which creates a private right of action for unpaid wages and liquidated damages, was revised to provide that "Action to recover such liability may be maintained against *any employer (including a public agency)* in any Federal or State court of competent jurisdiction . . . ." (emphasis added). (Taken from Appellee's Brief below.)

It is evident from the means by which federal employees were made subject to the FLSA that Congress intended to apply the same enforcement procedures to them as had previously been applied under the FLSA to private-sector employees. Under the 1974 FLSA amendments, federal employees were simply considered additional covered employees, and the amendment contains not the slightest indication that different procedures were intended nor any statutory provision that would authorize different treatment. The definition of employee and the designation of suable employers were simply revised to include the government. Thus, it must be concluded the federal employees bringing suit under the FLSA have a right to jury trial, and *Carter v. Marshall*, 457 F. Supp. 38 (D.D.C. 1978), so holds.

With that point established, the resolution of the present case ineluctably flows from the *Lorillard* decision. As noted above, *Lorillard* held that Congress was presumed to be aware of the court decisions under the FLSA holding that the right to jury trial existed in private actions. With that knowledge, Congress expanded *FLSA* coverage to federal employees by statutory language that must be read as intended to apply the

same procedures to FLSA actions brought by federal employees as to those brought by other employees, including the right to jury trial. *Lorillard* also held that Congress intended to apply the same procedures to ADEA enforcement as existed for FLSA enforcement. Since, as just demonstrated, Congress intended to grant a jury trial right in FLSA cases for all actions, including those brought by federal employees, when it simultaneously amended the ADEA to cover federal employees Congress therefore also intended that actions brought by federal employees under the ADEA should be subject to jury trial.

This conclusion is bolstered by the legislative history of the 1974 amendments. The application of the ADEA to federal employees was seen as a "logical extension of the Committee's decision to extend FLSA coverage to Federal, State, and local government employees." S. Rep. No. 93-690, 93d Cong., 2d Sess. 55 (1974). Moreover, the omission of federal employees from the ADEA as originally enacted "did not represent a conscious decision by Congress to limit the ADEA to employment in the private sector" but reflected only the fact that most governmental employees were not then subject to the FLSA. *Id.* This close linkage between the FLSA and the ADEA, which was acknowledged with explicit reference to federal government employees, provides further evidence that the use of FLSA procedures, including jury trial, was intended for ADEA actions against the government.

Thus, the government misses the point when it contends that *Lorillard* is applicable to this case because the FLSA right to jury trial was based on the Seventh Amendment guarantee, which does not govern cases brought against the United States. The Supreme Court held that Congress intended to adopt FLSA practice for ADEA enforcement regardless of its constitutional necessity, *Lorillard v. Pons, supra,* 434 U.S. at 577, and the reasons why FLSA practice came to be as it was in 1967 are irrelevant. (Taken from Appellee's Brief below.)

In short, the reasoning of *Lorillard* on the congressional intent to adopt FLSA procedures for the ADEA is alone dispositive of this case.

For this reason alone, the petition should be denied.

II.

The issue raised in the petition affects a very small number of cases litigated in the United States, and affects only a very small percentage of the cases in which the government is involved.

The Solicitor argues in part 4 of the petition, pages 13 and 14, that allowing jury trials in ADEA cases generally would increase the time and expense of litigating these cases and would add to the congestion in the courts.[1] It also argued that jury trials would lead to damage awards that were overly generous because of the virtually unlimited ability of the government to pay the verdict.

Furthermore, the Solicitor stated in footnotes 11 and 12 on page 13 of his petition that there were sixteen ADEA cases pending against the federal government where a jury demand had been made and twenty-three Title VII cases pending in the District of Columbia in which an ADEA claim was included in the complaint. It did not state whether jury demands had been made in the twenty-three Title VII cases with ADEA claims.

The number of ADEA cases pending in the District of Columbia against the federal government in which there is a jury demand as stated by the Solicitor demonstrates to this Court the tiny percentage federal ADEA litigation makes in comparison to the total litigation in which the government is involved in the District of Columbia.

---

1. *See also* Pet. 4-5.

As of June 30, 1977, there were 2,464 cases filed in the District of Columbia. Of those cases, there were 1,464 cases in which the government was a party. As of June 30, 1978, 2,454 cases were filed in the District of Columbia, of which 1,516 involved the government as a party. As of June 30, 1979, 3,121 cases were filed in the District of Columbia of which 1,974 involved the government as a party. As of June 30, 1980, 3,534 cases were commenced in the District of Columbia of which 2,228 involved the government as a party.[2]

Sixteen cases certainly will not cause congestion or increase the time and expense of litigating cases when one considers that the government was a party in 2,228 cases in the District of Columbia, as of June 30, 1980.

Furthermore, this author and her staff assistant examined the cover sheets filed with complaints in the District of Columbia for the months August 1980, and September 1980. There were eight jury demands made in which the government was a party, and only three of those involved the ADEA. For August 1980, there were five jury demands made in which the government was a party. None involved the ADEA.

Thus, federal ADEA litigation, in fact, makes up a very small percentage of the actual government litigation now occurring in the District of Columbia.

In addition, this writer has been involved in nine to eleven employment discrimination cases in which trials were conducted in the District of Columbia or in the Eastern District of Virginia. One was a federal ADEA case and was tried by a jury. This writer found that the jury trial was one of the most efficiently

---

2. *The Annual Report of the Director*, published by the Administrative Office of the United States Courts, Appendix Tables C-1, June 30, 1977; June 30, 1978; June 30, 1979; June 30, 1980.

run trials, lasting 3-1/2 days, as contrasted with some of the bench trials this author has been involved with in Title VII cases which have lasted as long as eight and eleven days.

The Solicitor argues in the petition, as did Judge Tamm in his dissent (Appendix A, 23a) that juries, more so, apparently, than judges, might be overly generous in making awards in ADEA cases where the federal government is the employer. That is not a factor that should be taken into consideration in determining whether Congress has intended ta right to a jury trial.

As Justice Black said, a jury trial is "a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizens, whether guaranteed by the Constitution or provided by a statute should be jealously guarded by the Courts. *Jacob v. New York,* 315 U.S. 752." *Galloway v. United States,* (dissent. opin. J. Black), 319 U.S. 372, 397 (1943).

Further, state juries, like federal juries, might just as well be inclined to make overly-generous awards since state juries would be well aware that the awards would be coming from tax revenues. Nonetheless, this Court held that state employees were entitled to jury trials in ADEA cases in *Lorillard v. Pons, supra.*

III.

There is no conflict of decisions by courts of appeal on this issue.

The only circuit to decide on the issue is the District of Columbia Circuit, the circuit for the seat of government, and it did so in favor of jury trials for federal employees.

Thus, if this Court denies this petition, inasmuch as it is a petition for review of the decision of the leading circuit on issues affecting federal employees, other courts of appeal will likely follow the District of Columbia's ruling on this issue when it is presented to them, thus obviating the need for this Court to consider the issue on its merits.

IV.

The position of the Solicitor on this issue is that the federal government as an employer should be treated differently, and has, in the words of Judge Tamm, with respect to jury trials, "special concerns." (Appendix A, 23a).

Other than the speculation of "overly-generous" awards, neither Judge Tamm nor the Solicitor spells out what those "special concerns" are.

Nor does the government claim that there is a compelling state interest that would be served by denying federal employees a jury trial, other than the claim that sixteen cases out of 2,228 cases would cause congestion for the courts because of the jury demand (*see* pp. 9-10 of this brief).

In *Harris v. U.S. Department of the Treasury*, 489 F. Supp. 476, 480 (N.D. Ill., 1980), the court stated:

> "In order to find that Congress intended to deny this right in ADEA suits brought by governmental employees, this Court would require more convincing evidence of congressional intent to achieve this purpose than has been provided by defendants. In some cases, perhaps, evidence that governmental interests would be frustrated by permitting jury trials might be persuasive. [footnote omitted]. In this

> case, however, the defendants have identified no governmental interest that would be affected adversely by allowing jury trials in public employee ADEA suits."

In addition, Attorney General Bell has ordered attorneys under his supervision not to take positions claiming a special status or role for the federal government in employment discrimination claims:

> "In a similar vein, the Department will not urge arguments that rely upon the unique role of the Federal Government. For example, the Department recognizes that the same kinds of relief should be available against the Federal Government as courts have found appropriate in private sector cases, including imposition of affirmative action plans, back pay and attorney's fees . . . . [citations omitted]. *Thus, while the Department might oppose particular remedies in a given case, it will not urge that different standards be applied in cases against the Federal Government than are applied in other cases.*" (Emphasis added.) Memorandum for United States Attorneys and Agency General Counsels from Attorney General Bell, Aug. 31, 1977., p. 2.

Although the Solicitor describes administrative enforcement procedures adopted in 1974 when Congress amended the ADEA to include federal employees under its protection (*see* Pet. 6, fn. 3), he fails to state that those administrative enforcement procedures are no longer in effect because of the Reorganization Act of President Carter reassigning ADEA enforcement from the Secretary of Labor and the now-defunct Civil Service Commission to the Equal Employment Opportunity

Commission (Reorganization Act No. 1 of 1978, 43 F.R. 19,807, *reprinted* in 92 Stat. 3781).

Congress did not object to this reassignment and the responsibility for the administrative enforcement of the ADEA for both federal and nonfederal employees is now vested in the EEOC.

Furthermore, federal employees, like nonfederal employees, are entitled to file suit without going through an administrative remedy, with the difference being the federal employee need only wait thirty days to go to the courts after serving a notice of intent to sue on the EEOC, 29 U.S.C. §633a(d); whereas, a nonfederal employee must wait at least sixty days to go to court after serving a charge of age discrimination on the EEOC, 29 U.S.C. §626(d).

To argue that there are different administrative procedures and jurisdictional prerequisites for federal and nonfederal employees as evidence that Congress intended that court procedures for federal employees would be different from those for nonfederal employees in ADEA cases no longer has any relevance, if it ever did, as a result of the Reorganization Act.

V.

The government has not always opposed jury trials in federal ADEA cases.

Formerly, it conceded that because of the holding in *Lorillard v. Pons,* federal employees were under the ADEA. However, the government argued that federal employees were not entitled to jury trials under the Equal Pay Act, 29 U.S.C. §206 (1-4), a position that the Honorable Thomas A. Flannery found inherently contradictory in his memorandum opinion in

Carter v. Marshall, 457 F. Supp. 38 (D.D.C. 1978) at p. 5, slip opin., fn. 3.

> "There is an inherent inconsistency in the government's opposition in that the 1974 amendments to the FLSA also made the ADEA applicable to federal employees, but the government does not oppose a jury trial on federal employees' ADEA claims. *See* 88 Stat. 55, 74 (1974)."

See also, pp. 15-16 of this brief where it is pointed out the government's earlier reliance on jurisdiction of federal ADEA cases resting exclusively in district courts as evidence of congressional intent allowing jury trials in federal ADEA cases, a position it now opposes in the petition.

VI.

District Court jurisdiction implies a right to jury trial.

The Supreme Court has twice considered statutes that conferred jurisdiction on district courts over actions against the United States. In each case, the Court held that by assigning the cases to the district courts, Congress intended to grant plaintiffs the right to a jury trial. *Law v. United States,* 266 U.S. 494, 496 (1925); *United States v. Pfitsch,* 256 U.S. 547 (1921); *see also, Crouch v. United States,* 8 F. 2d 435 (4th Cir. 1925); *United States v. McGovern,* 299 F. 302 (9th Cir. 1924). Since ADEA actions by federal employees must be brought in district court, 29 U.S.C. §663a(c), jury trial was intended.

The Solicitor is misleading this Court when he argues that there is no longer any general applicable statutory right to jury trial in federal district court because of the repeal of 28 U.S.C.

§770 by the Revision Act of 1948, Ch. 646, Section 39, 62 Stat. 992 (Pet. 10-11).

Sections 9 and 12 of the Judiciary Act of 1789 state in part:

> "Sec. 9: . . . (a) saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . . (d) And the trial of issues in fact, in the district courts, in all cases except civil causes of admiralty and maritime jurisdiction, shall be by jury."

> "Sec. 12: . . .and the trial of issues in fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury."

These sections of the Judiciary Act later became Revised Statutes 566 and 648. Later, they were codified at 28 U.S.C. (1925 ed.) §770. While it is true that 28 U.S.C. §770 was repealed by the Revision Act of 1948, 28 U.S.C. §1873 was enacted in its place. That section grants a trial by jury to either party who demands it in any case of admiralty and maritime jurisdiction relating to contract or tort arising upon or concerning any vessel of 20 tons or upward.

As the Historical and Revision Notes to that section indicate:

> "The first sentence of section 770 of Title 28 U.S.C. 1940 ed., providing generally for the right of jury trials in district courts, was omitted as covered by Rule 38 of the Federal Rules of Civil Procedure." 28 U.S.C.A. §1873, *Historical and Revision Notes,* page 317. (*See also,* H.R. 3214,

> 80th Congress, 2nd Session, stating that R.S. 566 and 648 are to be found at the newly-revised Title 28 at Section 1873.)

Thus, the right to a jury trial in federal district court remains in effect under the Federal Rules of Civil Procedure. It was never abolished.

The Solicitor is incorrect when he argues that Rule 38(a) of the Federal Rules of Civil Procedure ". . . does not state a general rule or presumption that jury trials are available whenever Congress confers jurisdiction on the District Courts" (Pet. 8-9) for the reasons set out above, namely that Rule 38 is an embodiment of the repealed portion of 28 U.S.C. §770 so stating.

The Solicitor's argument is therefore clearly erroneous when he argues that the substantial reliance on *United States v. Pfitsch,* 256 U.S. 547 (1921) by the court of appeals is misplaced, inasmuch as the general statutory right to jury trial in district court found in 28 U.S.C. §770 is now contained in Rule 38(a) of the Federal Rules of Civil Procedure.

Furthermore, this argument is directly contradictory to what the government stated in a memorandum in support of its reply to plaintiffs' response to defendants' opposition to plaintiffs' motion for a jury trial in *Carter v. Marshall,* C.A. No. 77-0365:

> "There is another important difference between the EPA and the ADEA. As we indicated in our last pleading on the jury trial issue, jurisdiction in an EPA action is founded on the Tucker Act because 29 U.S.C. §216(b) allows the United States to be sued 'in any Federal . . . court of competent jurisdiction.' Such suits can

be brought in either the district courts or the Court of Claims and thus there is no right to trial by jury. However, Congress authorized suits under the ADEA *only* in district courts, 29 U.S.C. §663a(c), and therefore the same argument cannot be made with respect to ADEA suits in which the United States is a defendant, because, in some instances, there is a right to a jury trial against the United States when the United States can be sued *only* in a district court. *United States v. Pfitsch,* 256 U.S. 547 (1921)."

Moore's Practice supports this reasoning:

"The particular grant of jurisdiction will determine the method of trial, court of jury, in the absence of some expressed provision dealing with the method of trial. . . . *If the action against the United States is brought under another jurisdictional statute and if under that statute the district court sits as a court of law then the doctrine of United States v. Pfitsch is applicable and there is a right of jury trial to all legal issues.* An example is an action brought under the War Risk Insurance Act." 5 J. Moore, *Fed. Pract.* ¶ 38.31[2] at 236, 236.3 (2nd Ed. Rev., 1979) (emphasis added).

In *Atlas Roofing Co. v. Occupational Safety and Health Administration,* 430 U.S. 442, 458 (1977) this Court stated:

". . . [T]he question whether a fact would be found by a jury turned to a considerable degree on the nature of the forum in which the litigant found himself. Critical factfinding was performed without juries in suits in equity, and there was no

> jurisdiction in admiralty, *Parsons v. Bedford,* 3 Pet. 433 (1830); . . . The jury was the factfinding mode in most suits in the common-law courts, . . ."

The court of appeals also concluded that the exclusive jurisdiction of the district courts over federal ADEA cases supports the inference Congress intended jury trials, and relied on *Pfitsch* and *Law* as authorities for its conclusion (Appendix A, 10a-11a).

VII.

There is no presumption against jury trials in actions involving the United States.

The Solicitor states: "It is well settled that the Seventh Amendment right to trial by jury in cases of common law does not extend to actions against the federal government because suits against the sovereign were unknown at common law . . . ." (Pet. 4). This is not a correct statement.

In *Chisholm v. Georgia,* 2 Wall 419, 459-460 (1792) Judge Wilson stated:

> "In England, according to Sir William Blackstone, no suit can be brought against the King even in civil matters. So, in that kingdom, is the law at this time received. But it was not always so. Under the Saxon government a very different doctrine was held to be orthodox. Under that doctrine, as we are informed by the Mirror of Justice, a book said by Sir Edward Coke to have been written, in part, at least, before the Conquest; under that government, it was ordained, that the king's court should be

> open to all plaintiffs by which, without delay, they should have remedial writs, as well as against the king or against the queen, as against any other of the people. (d). The law continued to be the same for some centuries after the conquest. Until the time of Edward I, the king might have been sued as a common person. The form of the process was even imperative . . . *True, it is that now, in England, the King must be sued in his courts by petition; but even now the difference is only in the form, not in the thing. The judgments or decrees of those courts, will substantially be the same upon a precatory as upon a mandatory process.*" (Emphasis added.)

From the shaky premise that the suits against the sovereign were unknown at the common law, the Solicitor states at p. 4 that it follows "[a]ccordingly, there is no right to trial by jury in actions against the government unless 'Congress, in the legislation cited, has made it applicable.' *Galloway v. United States, supra,* 319 U.S. at 389."

Since Ms. Nakshian contends, as did the court of appeals conclude, that "the legislation cited" made a jury trial applicable to federal ADEA cases, obviously what the Solicitor means, as he later states in his petition at pp. 12 and 13, is that unless there is an explicit statutory statement allowing jury trials against the federal government then ". . . the courts must assume that Congress does not intend to permit jury trials when it authorizes actions against the United States" and the circuit court's discussion in this case ". . . represents a marked departure from these principles." The Solicitor's conclusions are plainly incorrect.

In its brief below, as in the petition, the government relied exclusively on an erroneous axiom that there is sovereign immunity from jury trials (Appellant's Brief, 11).

The court of appeals pointed out in footnote 4 of its opinion (Appendix A, 9a):

> "This view seems to be based on the supposition that there is a presumption against jury trial in actions against the Government even where sovereign immunity has been waived. The source of this supposition is not clear, but it appears to be connected with a misunderstanding of the doctrine of sovereign immunity. *See* dissenting opinion, ____ F2d at ____ (pp. 11-12). Since sovereign immunity bars *all* actions against the Government — actions tried to the court as well as those tried to a jury — it is difficult to see why this doctrine should create a presumption against any particular method of trial. Indeed, if there are to be any presumptions, it would seem that the preference for jury trials in our jurisprudence would support a presumption in favor of such trials. In any event, once Congress has waived the Government's immunity, and where it has not explicitly specified the trial procedure to be followed, sovereign immunity drops out of the picture. Courts must then scrutinize the available indicia of legislative intent to see what trial procedure Congress authorized."

In addition, as this Court pointed out in *Curtis v. Loether*, 415 U.S. 189, 193 (1974), while the thrust of the Seventh Amendment is to preserve the right to jury trial as it existed in 1791, "[I]t has long been settled that the right extends beyond

the common law forms of action recognized at that time. Mr. Justice Story established the basic principle in 1830:

> "'The phrase "common law," found in this clause is used in contradistinction to equity, in admiralty, in maritime jurisprudence. . . . By *common law* [the Framers of the Amendment] meant that . . . not merely suits which the *common* law recognize under its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered. . . . In a just sense, the amendment may well be construed to embrace all suits which were not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.' *Parsons v. Bedford,* 3 Pet. 433, 446-447 (Emphasis in original)."

In an action wherein the government or any other employer covered by the ADEA is sued for unpaid minimum wages and overtime compensation was unheard of in the common law. Yet, there is no question but the ADEA provides a legal remedy which this Court found in *Lorillard, supra,* and, therefore, entitles the parties in ADEA actions to a jury trial.

In *Leimer v. Woods,* 196 F. 2d 828 (8th Cir. 1952) the court held the defendant-landlord was entitled to a jury trial, although the Administrator could have brought suit in the Court of Claims where jury trials are not allowed. *See McElrath v. United States,* 102 U.S. 426, 439-40 (1880).

The Court found there was a right to a jury trial based on the Seventh Amendment since the recovery of treble damages

fell within the traditional scope of the common law actions of debt. *See* Emergency Price Control Act of 1942, Chap. 26, §205(e), 56 Stat. 23.

This Court also recently stated there was a right to a jury trial in a *Bivens* action against federal officials for money damages. *See Carlson v. Green,* ____ U.S. ____, 100 S. Ct. 1468 (1980).

In conclusion, the Solicitor's petition confuses the well-established principle of sovereign immunity from unconsented suits against it with a never-recognized theory of sovereign immunity from jury trials. It is clear that the United States may not be sued without its consent and that the United States may condition its waiver of such sovereign immunity by establishing the terms and conditions under which it may be sued. *See, e.g., United States v. Testan,* 424 U.S. 392, 399 (1976). One of the conditions the government may impose when it consents to be sued is that the case is to be tried to the court without a jury. *McElrath v. United States,* 102 U.S. 426, 439-40 (1880). But this doctrine in no way implies that jury trials are unavailable unless they are unequivocally authorized by Congress.

As further evidence of an absence in the law of a presumption against jury trials when the United States is sued, Congress has found it necessary to state explicitly that there shall be no jury trial. *See* 28 U.S.C. §2402 [providing that any action under 28 U.S.C. §1346, except under §1346(a)(1), shall be tried by the court without a jury]; and 28 U.S.C. §2409a(e) (providing that any action brought under §2409a against the United States shall be tried without a jury).

VIII.

A fair statutory interpretation of the ADEA infers jury trials for federal ADEA cases.

The issue presented to the Court in this case is an ordinary question of statutory interpretation in which it must be determined whether Congress did or did not intend that government employees who bring actions under the ADEA should have a right to jury trial. Congress necessarily intended some procedure and the statute must be construed to ascertain what that procedure is. No presumption against jury trial exists and no unequivocal grant of the right to jury trial need be found. Like other issues of statutory interpretation, the fact that the question is not resolved by explicit language in the ADEA simply means that the Court must look elsewhere to infer congressional intent. That is precisely what this Court did in *Lorillard v. Pons, supra,* in which congressional intent to confer a right to jury trial was inferred from other language in the ADEA and the Act's legislative history.

In this section we demonstrate by similar reasoning that Congress intended that jury trial would be available in ADEA action brought by federal employees.

In *Harris v. United States Department of Treasury,* 489 F. Supp. 476, 478 (N.D. Ill. 1980), the court held the following:

> "In extending coverage to government employees there is no indication that the Congress intended to distinguish between the procedures available to private and public employees. Rather Congress hoped that the expanded coverage would 'remove discriminatory barriers against employment of older workers in government jobs at the federal and local

> government level *as it has and continues to do in private employment'* HR REP #93-913, 93rd Congress, 2nd Session, reprinted in [1974] U.S. Code, Congressional and Administrative 2850." (Emphasis supplied.)

The *Harris* court concluded:

> "The legislative history simply does not support the conclusion that the Congress intended to distinguish between private and public employees for this purpose. Accord *Nakshian,* 20 FEP cases at 928 [*Nakshian v. Claytor,* 20 FEP cases 927 (D.D.C. 1979)]."

The *Harris* court also rejected the government's argument in that case, also argued by the Solicitor in the petition, that Section 15(f), combined with the expressed provision for a jury trial in 29 U.S.C. §626(c)(2), was intended to deny the right to jury trials to federal employees suing under the ADEA.

A review of the legislative history surrounding the jury trial amendment demonstrates this.

The jury trial issue was raised on the Senate floor after the House had already passed the bill. The primary purpose of the bill was the highly controversial one of revising the age for mandatory retirement, and the jury trial amendment was considered only briefly. Senator Kennedy offered the amendment on October 19, 1977 -- before *Lorillard* had been decided. He pointed out that three out of four circuits that had considered the issue had ruled that jury trial was available under the ADEA, that the amendment would clarify the question, and that jury trials were especially appropriate in age discrimination cases:

> "[J]uries are more likely to be open to the issues which have been raised by plaintiffs. Sometimes, a judge may be slightly callous, perhaps because he himself is protected by life tenure, or because he is somewhat removed from the usual employer-employee relationship. The jury may be more neutral in such circumstances.
>
> * * *
>
> It seems to me to be wise to insure that particular protection to those who are subject to age discrimination."

123 Cong. Rec. S17297 (daily ed. Oct. 19, 1977). The amendment was immediately adopted without debate. *Id.*

When the bill was eventually reported by the conference committee (Mar. 14, 1978), *Lorillard* had just been decided (Feb. 22, 1978). The conference report adopted the Senate amendment, referring to *Lorillard,* and indeed expanded the amendment to cover liquidated damages expressly, since this issue had been left undecided by the Supreme Court. H.R. Rep. No. 95-950, 95th Cong., 2d Sess. 13-14 (1978).

The reasonable reading of this legislative history is that Congress believed strongly in the appropriateness of jury trial in age discrimination suits and acted to confirm that right wherever doubt appeared — first when the split in the circuits clouded the jury trial right generally, and subsequently when the *Lorillard* decision left an aspect of the jury trial right undecided. Section 7 of the ADEA was the legislative focus only because the divided court of appeals' cases involved that section. The strong support for clarifying the right to jury trials in age discrimination cases indicated by the speedy adoption of this unopposed amendment, the fact that jury trial was favored for

reasons relating to perceptions about the comparative characteristics of judges and juries (and not for reasons related to employers or employees), and the complete absence of any indication that a different result would have been reached had the question of federal government employees specifically been raised all point to a conclusion that Congress intended to provide for jury trials in all ADEA suits brought by employees.

As the court of appeals stated, this reading of:

> "The legislative history of the 1978 amendment is consonant with a statement placed in the Congressional Record on September 5, 1979, by Congressman Pepper, Chairman of the House Committee on Aging and a member of the Conference Committee on the 1978 amendments to the ADEA. Congressman Pepper stated: 'Those who participated in the House and Senate debates [on the amendment] would be surprised to learn that legislative efforts to confirm the right to a jury trial have been construed as a denial of that right. It would be indefensible to deny Federal employees the right to a jury trial. Under any legislative enactment in the field of civil rights, the Federal Government should be the leader not a grudging participant. . . . As chairman of the Committee on Aging, I will continue to watch developments in this area, and will ask for further delineation of the right of Federal employees to a jury trial if conflicting judicial interpretations are not resolved in favor of a jury trial.' *Cong. Rec.* E 4258 (daily ed. Sept. 9, 1979)." (Appendix A, 14a).

In conclusion, amending §633a(c) would have been superfluous since Congress had waived sovereign immunity;

knew the meaning of "legal relief" when it incorporated that term into §633a(c); placed exclusive jurisdiction over federal ADEA cases in the district courts; knew of the right to a jury trial in the district courts, as stated in Rule 38(a) of the Federal Rules of Civil Procedure, an embodiment of the repealed portion of 28 U.S.C. §770; and did not object to the reassignment of the responsibility for the administrative enforcement of the ADEA for both federal and nonfederal employees to the EEOC.

This Court has also found a right to a jury trial against the federal government by implication from the provisions of a statute in *Wickwire v. Reincke,* 275 U.S. 101, 105 (1927):

> "'The right of the . . . [taxpayer] to a jury in such a case is not to be found in the Seventh Amendment to the Constitution but merely arises by implication from the provisions of §3226, Revised Statutes [See 26 U.S.C. §3772], which has reference to a suit at law.'" (5 J. Moore, *Fed. Prac.,* ¶38.31[2] at 239).

This Court's ". . . solicitude for the preservation of the right to the jury trial is illustrated by its statements in *Hodges v. Easton,* 106 U.S. 408 and *City of Montgomery, West Virginia v. Royal Insurance Co.,* 337 U.S. 254." *Leimer v. Woods,* 196 F. 2d 828, 836, f. 7 (8th Cir. 1952).

This solictude is further demonstrated by this Court's holdings in *Beacon Theatres v. Westover,* 359 U.S. 500 (1959); *Curtis v. Loether,* 415 U.S. 189 (1974); *Dairy Queen v. Wood,* 369 U.S. 469 (1962); *Lorillard v. Pons,* 434 U.S. 575 (1978); and *Pernell v. Southall Realty,* 416 U.S. 363 (1974).

Yet, the government would deny federal employees, and no other individuals, the right to jury trials under the ADEA on the basis of the absence of an explicit grant of a right to a jury trial.

As Judge Oberdorfer stated:

> "Once the government has consented to sit, its silence or ambiguity about whether plaintiffs can demand a jury trial should not be grounds for the denial of such trials. Courts have a responsibility to take a close look at Congressional intent and, if necessary, the constitutional right to a jury trial before they hold that plaintiffs are not entitled to trial by a jury of their peers." (Appendix A, 34a-35a).

Judge Aspen stated similarly in *Harris v. Treasury, supra,* (*see* p. 10 of this Brief):

> "Although the principles of the seventh amendment do not control the outcome of this case, the values which underlie the constitutional guarantee of the right to jury trial do merit consideration. Clearly, the tradition of a trial before a jury of one's peers holds a special place in our system of jurisprudence."

Finally, the government urges the Court to set out standards for determining the availability of jury trials in actions against the government in ADEA cases and generally (Pet. 14).

However, the issue that is before this Court is solely whether a federal employee is entitled to a jury trial under the ADEA. The Solicitor has raised and brought to the Court's attention other statutes not raised at the lower court levels and, therefore, are not before this Court at this time.

CONCLUSION

For all of the reasons stated in this brief, the petition for writ of certiorari should be denied.

Respectfully submitted,

s/ Patricia J. Barry
Attorney for Respondent

No. 80-242

MICHAEL RODAK JR. CLERK

In the Supreme Court of the United States

OCTOBER TERM 1980

EDWARD HIDALGO, SECRETARY OF THE NAVY,
PETITIONER

v.

ALICE NAKSHIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

	Page
Cases:	
Curtis v. *Loether*, 415 U.S. 189	2
Edmondson v. *Simon*, No. 76 C 4591 (N.D. Ill. Aug. 26, 1980)	4
Galloway v. *United States*, 319 U.S. 372 ..	2
Glidden Co. v. *Zdanok*, 370 U.S. 530	2
Harris v. *U.S. Dep't of the Treasury*, 489 F. Supp. 476	4
Lorillard v. *Pons*, 434 U.S. 575	2, 4
McElrath v. *United States*, 102 U.S. 426 ..	2
Constitution, statutes and rule:	
United States Constitution, Seventh Amendment	2
Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*:	
Section 4(a), 29 U.S.C. (Supp. II) 626(c)(2), as added, Pub. L. No. 95-256, 92 Stat. 191	3
Section 7(b), 29 U.S.C. 626(b)	4
Section 7(c), 29 U.S.C. (Supp. II) 626(c)	2, 3
Section 15(c), 29 U.S.C. 633a(c)	3
Section 15(f), 29 U.S.C. 633a(f)	3
Fair Labor Standards Act, 29 U.S.C. 216 .	2
28 U.S.C. 2402	3
Fed. R. Civ. P. 38(a)	2

In the Supreme Court of the United States

OCTOBER TERM 1980

No. 80-242

EDWARD HIDALGO, SECRETARY OF THE NAVY, PETITIONER

v.

ALICE NAKSHIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

---

1. Respondent contends (Br. in Opp. 17-21) that suits against the sovereign for money damages are largely indistinguishable from suits at common law against private parties and that a right to jury trial should therefore be recognized in actions against the federal government under the Age Discrimination in Employment Act (ADEA).[1] But contrary to respondent's apparent assertion (Br. in Opp. 17-18, 20),

[1] The opinion of the court of appeals is now reported at 628 F.2d 59.

there is no Seventh Amendment right to a jury trial in suits against the government precisely because a cause of action against the government is dependent upon a waiver of sovereign immunity and is therefore not a suit at "common law" within the meaning of that Amendment. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962) (opinion of Harlan, J.); *Galloway* v. *United States*, 319 U.S. 372, 388–389 (1943); *McElrath* v. *United States*, 102 U.S. 426, 440 (1880). As a result, where Congress has consented to suit against the government, there is no right to trial by jury unless Congress affirmatively so provides. *Galloway* v. *United States*, *supra*, 319 U.S. at 388–389; Fed. R. Civ. P. 38(a).[2]

There is nothing in the ADEA affirmatively providing for jury trials in suits against the government. To the contrary, when Congress amended Section 7(c) of the ADEA in 1978 expressly to authorize jury trials in suits against private employers and state and local

[2] Respondent suggests (Br. in Opp. 20) that this reasoning is unsound because a suit for unpaid minimum wages or overtime compensation (presumably under the Fair Labor Standards Act, 29 U.S.C. 216) "was unheard of in the common law" and yet a Seventh Amendment right to a jury trial has been recognized in such suits against private parties. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 n.7 (1978). The implication appears to be that comparable suits against the government should likewise be tried to a jury. Respondent misapprehends the nature of the Seventh Amendment right. That right attaches in suits between private parties wherever the relief to be granted is legal in nature and is therefore similar to that available in a suit at common law, whether or not the particular cause of action actually was available at common law when the Seventh Amendment was adopted. *Id.* at 583; *Curtis* v. *Loether*, 415 U.S. 189, 193–196 (1974). The creation of new causes of action against private parties has no bearing on the availability of jury trials in suits against the government.

governments,[3] it did *not* amend Section 15(c) of the Act (29 U.S.C. 633a(c))—the separate section authorizing civil actions against the federal government[4]—to authorize jury trials in federal sector cases. This failure to provide for federal sector jury trials under the ADEA, at a time when Congress' attention was focused on the issue, conforms to the general rule that, absent legislation to the contrary, suits against the government are to the court, not a jury. See, *e.g.*, *Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 572 (opinion of Harlan, J.), *Galloway* v. *United States*, *supra*, 319 U.S. at 388–389; 28 U.S.C. 2402. As Judge Tamm observed in dissent (Pet. App. 22a), "[t]he failure to adopt a parallel amendment indicates that Congress did not intend to extend its waiver of sovereign immunity to permit jury trials for federal employees."[5]

---

[3] See 29 U.S.C. (Supp. II) 626(c)(2), as added by Pub. L. No. 95–256, Section 4(a), 92 Stat. 190.

[4] As we demonstrate in our petition (at 6–7), Section 15 contains wholly independent substantive and procedural provisions governing age discrimination in federal employment, and Section 15(f) precludes incorporation of the provisions of the FLSA upon which the Court relied in *Lorillard* v. *Pons*, *supra*. For this reason, respondent's reliance (Br. in Opp. 2–7) on *Lorillard*, which involved a suit against a private employer under Section 7(c), is misplaced.

[5] Respondent seeks (Br. in Opp. 25) to diminish the significance of Congress' failure to amend Section 15(c) to provide for jury trials when it amended Section 7(c) by arguing that there is no indication that Congress would have reached a different result with respect to suits against the government. But where the right to a jury trial depends on a statutory grant by Congress, mere speculation about what Congress *might* have done had it expressly addressed the issue cannot support a finding of an affirmative grant of that right. Moreover, the limited debate on the 1978 amendment to Section 7(c), like the decision in *Lorillard* that furnished a backdrop for that amendment, concerned the right to a jury trial in actions against *private* employers. It cannot be presumed that Congress would have

2. Respondent cites (Br. in Opp. 10–11, 27) *Harris* v. *U.S. Dep't of the Treasury*, 489 F. Supp. 476, 480 (N.D. Ill. 1980), in support of her argument that there is a right to jury trial in ADEA cases against the federal government. However, another judge in that same district, finding Judge Tamm's dissenting opinion in the instant case and the government's analysis more persuasive, has recently concluded that there is no right to a jury trial in federal sector ADEA cases. *Edmondson* v. *Simon*, No. 76 C 4591 (N.D. Ill. Aug. 26, 1980); see App., *infra*, 1a–6a. As we pointed out in our petition (at page 13), the court of appeals' decision in the instant case has already led to a number of jury trial demands in the district court in the District of Columbia, and will no doubt spur considerable litigation in other districts, as it already has done in the Northern District of Illinois. Prompt resolution of the important and unsettled jury trial question therefore is appropriate.

For the reasons stated above and in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1980

---

reached the same result with respect to suits against the federal government, which raise "different concerns" (Pet. App. 23a; Tamm., J., dissenting). ADEA suits against private parties are patterned after FLSA procedures (29 U.S.C. 626(b)), under which a jury trial right against private employers has been recognized. *Lorillard* v. *Pons*, *supra*, 434 U.S. at 580 n.7. But ADEA suits against the *federal government* are patterned after suits under Title VII of the Civil Rights Act of 1964, in which there is no right to a jury trial even against private parties (see Pet. 7–8 n.5).

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 76 C 4591

VERA L. EDMONDSON, ETC., PLAINTIFF

v.

WILLIAM SIMON, ETC., ET AL., DEFENDANTS

Opinion and Order

Plaintiff has sued the Secretary of the Treasury and other federal government defendants, alleging violations of the Age Discrimination in Employment Act of 1967 (the "ADEA" or "Act"), Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, and has filed a jury demand under the ADEA count of her complaint. Defendants have moved to strike that jury demand. For the reasons stated in this opinion and order, defendants' motion is granted.

There is no provision of the Act that in terms grants a federal employee plaintiff the right to a jury trial; the Act is silent on that score. Each party's arguments are therefore necessarily based on inferences drawn from the inaction of Congress in dealing specifically with the jury trial issue as to federal employees. And each party seeks to rely, albeit in a different way, on the Supreme Court's decision in *Lorillard* v. *Pons*, 434 U.S. 575 (1978).

Lorillard involved, as to the employee of a *private* employer, the identical jury trial issue presented here. There too the statute was silent, and the Supreme Court implied the existence of a right to jury trial as a matter of statutory construction.

Essentially plaintiff's position is that *Lorillard* was predicated on the "significant indication" (434 U.S. at 580) of a congressional intention to parallel the Act with the Fair Labor Standards Act (the "FLSA"). In 1974 the FLSA was amended to allow suits against the United States. Although the FLSA itself contains no specific grant of a jury trial right to federal employees, plaintiff seeks to infer that the right to sue the United States under the 1974 amendment carried with it the established right (against other employers) to a jury trial. In turn plaintiff seeks to draw the inference from *Lorillard* that the parallel between the ADEA and the FLSA includes the inferential jury trial right.

Defendants draw an opposite set of inferences. Their basic premise is that the FLSA right to jury trial against non-governmental employees derives from the Seventh Amendment, which has no force against the federal government. From this they argue that, absent an explicit waiver of governmental immunity (not present in the ADEA), federal employees have no right to jury trial. *Lorillard's* implication of an ADEA right to jury trial, drawn from the FLSA cases dealing with employees in the private sector, should therefore not extend to federal governmental employees. Finally, they say, the 1978 amendment to the ADEA that codified and extended the *Lorillard* decision as to non-governmental employees impliedly negates any congressional intention to entitle federal governmental employees to jury trials.

Simply to state the parties' positions is to demonstrate that each has some strengths and some weaknesses—a not unexpected result where arguments seek to build inferences on other inferences. Only one Court of Appeals decision, *Nakshian* v. *Claytor*, 22 F.E.P. Cases 41 (D.C. Cir. 1980) and one District Court case, Judge Aspen's decision in *Harris* v. *United States Department of Treasury*, 79 C 0859, 22 F.E.P. Cases 592 (N.D. Ill. 1980), have dealt directly with the problem. Each upheld plaintiff's position here, *Nakshian* in a two-to-one decision of the Court of Appeals for the District of Columbia.

Though the issue is thus clearly a close one, it seems to the Court that the government and Judge Tamm's dissenting opinion in *Nakshian* have the better of the argument.

It was not until 1974 that the ADEA was made applicable to federal employees at all. That was done by enacting an entirely separate action (29 U.S.C. § 633a) covering employees of the federal government (29 U.S.C. §§623 ff. cover employees of private employers). Then after *Lorillard* Congress enacted a number of 1978 amendments to the ADEA. Section 626 was amended as to employees in the *private* sector to codify the *Lorillard* result and to extend jury trial to actions seeking liquidated damages and equitable relief (29 U.S.C. § 626(c)(2)). Section 633a was also amended as to federal employees—but *not* by the insertion of any jury trial provision.[1]

[1] One of the 1978 amendments relating to the federal sector (the addition of 29 U.S.C. § 633a(f)) provides:

> (f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section [the subsection creating the substantive non-age-discrimination

Section 626(b) of the Act provides:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title [all comprising part of the FLSA] and subsection (c) of this section.

As to non-governmental employees the teaching of *Lorillard* is that Congress was presumed to have enacted the ADEA with knowledge of the established construction of the FLSA granting the right to jury trials. But there is no such established construction of the FLSA as to *federal* employees (as already pointed out, the 1974 amendment extending FLSA coverage to governmental employees had no specific provision either granting or denying jury trials).

Because the Seventh Amendment's guaranty of jury trials does not extend to suits against the government (given the sovereign immunity that existed at common law when the Bill of Rights was adopted), it is necessary to find in the applicable statute a governmental consent not only to be sued but also to have the issues tried before a jury. When the government consents to be sued, "it is free to allow suit on whatever terms it chooses, and may grant or deny jury trial as it sees

---

right] shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

Under the literal reading of that subsection, the jury trial section of the Act (29 U.S.C. 626(c)(2)) would be one of the provisions specifically made inapplicable to claims of federal governmental age discrimination. Perhaps because that argument could prove too much (possibly leading as well to depriving federal employees of the benefit of the attorneys' fees or liquidated damages provisions of the Act), the government does not seek to rely on Section 633a(f) in this case.

fit," 9 Wright & Miller, Federal Practice and Procedure § 2314, at 69; see 5 Moore's Federal Practice ¶ 38.31[2], at 236.

It has already been said that the 1974 amendments to the ADEA extending its coverage to federal employees contained no specific provision either way on the issue of jury trials. But that gap is more meaningful than mere silence. Congress had before it, but failed to elect, the available alternative of enacting proposed legislation that would clearly have resolved the issue in favor of jury trials.[2] Instead Congress adopted wholly separate provisions for federal employees. In this Court's view Congress' action negates any inference "by fair implication" that the 1974 amendments granted such employees a right to jury trial. Congress may have desired to extend equivalent *substantive* protection against age discrimination to federal employees, but it does not follow that it intended that the *procedures* be identical in all respects to those for employees in the private sector.

There is even more compelling congressional action — and inaction—that negates any implication of the right to jury trial. When the post-*Lorillard* amendments were adopted in 1978, Congress specifically con-

---

[2] Senator Bentsen had originally introduced S. 3318, 92d Cong. 2d Sess., 118 Cong. Rec. 7745 (1972), which would have extended the ADEA to federal employees by amending the definition of "employer" in 29 U.S.C. § 630(b) to include the federal government. Had that provision been adopted, all procedural aspects of the Act, including the right to jury trials, would have extended equally to federal employees and to employees in the private sector; but the amendment was *not* adopted in that form. Later in the same term Senator Bentsen instead introduced the amendments that, as the 1974 amendments to the ADEA ultimately did, established a *separate* section with special procedures dealing with governmental age discrimination.

sidered the question of jury trials and amended *only* the private sector sections of the Act to codify and extend *Lorillard*. It did not choose to amend the federal employees section, Section 633a, to provide a comparable jury trial right, even though it contemporaneously amended that section in other respects. In this Court's view, Judge Tamm drew the correct inference when he said in dissent, *Nakshian* v. *Claytor*, 22 F.E.P. Cases at 48:

> The failure to adopt a parallel amendment indicates that Congress did not intend to extend its waiver of sovereign immunity to permit jury trials for federal employees.

This Court also finds persuasive Judge Tamm's reasoning in rejecting the other arguments adduced by plaintiff and by the majority opinion of his brethren in support of a jury trial. *Id.* at 48–49.

Finally, the doctrine of governmental immunity cannot be ignored. True enough, it has been deprived of much of its common law force, but always by *statutory* changes and not by judicial legislation. Absent a clear showing of congressional intent, certainly the doctrine retains enough vitality to overcome an attenuated argument like that proffered by plaintiff, based on a presumed intention grounded on an inference once removed.

For the reasons stated in this opinion, defendants motion to strike plaintiff's jury demand in Count II of the complaint is hereby granted.

/s/ _____
MILTON I. SHADUR
United States District Judge

Date: August 26, 1980

☆U.S. GOVERNMENT PRINTING OFFICE: 1980 332956 144

No. 80-242

In the Supreme Court of the United States

OCTOBER TERM, 1980

EDWARD HIDALGO,
SECRETARY OF THE NAVY, PETITIONER

v.

ALICE NAKSHIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ROBERT E. KOPP
MICHAEL JAY SINGER
ROBERT A. REUTERSHAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-242

EDWARD HIDALGO,
SECRETARY OF THE NAVY, PETITIONER

v.

ALICE NAKSHIAN

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

QUESTION PRESENTED

Whether the plaintiff in an action against the federal government under Section 15(c) of the Age Discrimination in Employment Act, 29 U.S.C. 633a(c), is entitled to trial by jury.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	1
Summary of argument	4
Argument:	
Trial by jury is not available in suits against the federal government under the Age Discrimination in Employment Act	10
A. There is no right to trial by jury in actions against the United States unless Congress affirmatively grants that right in the applicable legislation	10
B. Section 15 of the Age Discrimination in Employment Act does not provide for a right to trial by jury	16
1. The language of the Act	16
2. The legislative history	18
a. Background: Section 7 of the 1967 Act and the *Lorillard* decision	18
b. The 1974 Amendments	20
c. The 1978 Amendments	26
C. The court of appeals erred in implying a right to trial by jury from the Act's provision for jurisdiction in federal district courts and its authorization for the award of "legal" relief in federal sector cases	29
1. The conferring of jurisdiction on the district courts	30
2. The provision for award of "Legal or Equitable" relief	35
Conclusion	41

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES

Cases: Page

Albermarle Paper Co. v. *Moody*, 422 U.S. 405 ..... 22, 40
Atlas Roofing Co. v. *OSHRC*, 430 U.S. 442 10
Beatty v. *United States*, 203 F. 620 33
Blum v. *Gulf Oil Corp.*, 597 F.2d 936 25
Bradley v. *Kissinger*, 418 F. Supp. 64 22
Brown v. *GSA*, 425 U.S. 820 40
Colgrove v. *Battin*, 413 U.S. 149 10
CPSC v. *GTE Sylvania, Inc.*, No. 79-521 (June 9, 1980) 16
Crowell v. *Benson*, 285 U.S. 22 ..... 19, 35
Curtis v. *Loether*, 415 U.S. 189 ..... 25, 35, 36-37
Domenico Ruggiero v. *Compania Peruana de Vapores "Inca Capac Yupanqui,"* Nos. 80-7595, 7597 and 7599 (2d Cir. Jan. 15, 1981) 14
Edmondson v. *Simon*, 87 F.R.D. 487 29
Fedorenko v. *United States*, No. 79-5602 (Jan. 21, 1981) 17
Filbin Corp. v. *United States*, 265 F. 354 33
Filbin Corp. v. *United States*, 266 F. 911 32
Galloway v. *United States*, 319 U.S. 372 10
Glidden Co. v. *Zdanok*, 370 U.S. 530 ..... 10, 11
Great American Fed. Savings & Loan Ass'n v. *Novotny*, 442 U.S. 366 25
Harmon v. *May Broadcasting Co.*, 583 F.2d 410.. 25
Indian Towing Co. v. *United States*, 350 U.S. 61.. 14
Law v. *United States*, 266 U.S. 494 34
Lewis v. *Times Publishing Co.*, 185 F.2d 457 36
Lewis v. *United States*, 445 U.S. 55 16
Lorillard v. *Pons*, 434 U.S. 575 ..... *passim*
McElrath v. *United States*, 102 U.S. 426 10-11
Morelock v. *NCR Corp.*, 546 F.2d 682, vacated and remanded, 435 U.S. 911 26
Morgantown v. *Royal Ins. Co.*, 337 U.S. 254 34
Olearchick v. *American Steel Foundries*, 73 F. Supp. 273 36
Oscar Mayer & Co. v. *Evans*, 441 U.S. 750 18
Pernell v. *Southall Realty*, 416 U.S. 363 33
Pons v. *Lorillard*, 549 F.2d 950, aff'd, 434 U.S. 575 26

Cases—Continued Page

Rogers v. *Exxon Research & Eng'r Co.*, 550 F.2d 834, cert. denied, 434 U.S. 1022 26
Rubin v. *United States*, No. 79-1013 (Jan. 21, 1981) 16
Soriano v. *United States*, 352 U.S. 270 15
Train v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 17
United States v. *Culbert*, 435 U.S. 371 17
United States v. *King*, 395 U.S. 1 ..... 14, 31
United States v. *Kubrick*, 444 U.S. 111 ..... 14, 15
United States v. *McGrave*, 270 F. 761 33
United States v. *Mitchell*, 445 U.S. 535 ..... 11, 14
United States v. *Pfitsch*, 256 U.S. 547 ..... 9, 31, 32
United States Railroad Retirement Board v. *Fritz*, No. 79-870 (Dec. 9, 1980) 18
United States v. *Reynolds*, 397 U.S. 14 33
United States v. *Sherwood*, 312 U.S. 584 ..... 11, 14
United States v. *Testan*, 424 U.S. 392 11
United States v. *Thirty-Seven Photographs*, 402 U.S. 363 19
Wickwire v. *Reinecke*, 275 U.S. 101 13
Wirtz v. *Jones*, 340 F.2d 901 36

Constitution, statutes, rules and regulation:

United States Constitution, Seventh Amendment ..*passim*
Act of July 30, 1954, ch. 648, Section 2(a), 68 Stat. 589 12
Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.* 1
Section 4, 29 U.S.C. 623 23
Section 4(a), 29 U.S.C. 623(a) 18
Section 7, 29 U.S.C. 626 ..... 6, 7, 18, 23, 25, 38, 39
Section 7(b), 29 U.S.C. 626(b) 18, 19, 20, 22, 36, 37, 40
Section 7(c), 29 U.S.C. 626(c) ..... *passim*
Section 7(c), 29 U.S.C. (Supp. II) 626(c) 6, 7, 17, 20, 30, 39, 41
Section 7(c)(2), 29 U.S.C. (Supp. II) 626(c)(2) 20, 27
Section 7(d), 29 U.S.C. 626(d) 21

Constitution, statutes, rules and regulation—Continued

Page

Section 11(b), 29 U.S.C. 630(b) 18, 21, 23
Section 12(b), 29 U.S.C. (Supp. II) 631(b) .. 28
Section 15, 29 U.S.C. 633a ..... *passim*
Section 15(a), 29 U.S.C. 633a(a) 21, 23, 39
Section 15(b), 29 U.S.C. 633a(b) 21, 22, 23, 39, 40
Section 15(c), 29 U.S.C. 633a(c) ..... *passim*
Section 15(f), 29 U.S.C. (Supp. II) 633a(f) .. 7, 28, 36

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.*:

Section 706(f)(3), 42 U.S.C. 2000e-5(f)(3) .. 31
Section 717, 42 U.S.C. 2000e-16 6
Section 717(a), 42 U.S.C. 2000e-16(a) 23, 24
Section 717(b), 42 U.S.C. 2000e-16(b) 23, 24, 39
Section 717(c), 42 U.S.C. 2000e-16(c) 22
Section 717(d), 42 U.S.C. 2000e-16(d) 22

Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* 18

Section 3(d), 29 U.S.C. 203(d) 24
Section 3(e)(2), 29 U.S.C. 203(e)(2) 24
Section 15, 29 U.S.C. 215 19
Section 16, 29 U.S.C. 216 19
Section 16(b), 29 U.S.C. 216(b) 18
Section 16(c), 29 U.S.C. 216(c) 18
Section 17, 29 U.S.C. 217 ..... 18, 19

Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 *et seq.*:

Section 28(a), 88 Stat. 74 23
Section 28(b)(2), 88 Stat. 74 ..... 3, 20, 23

Lever Act, ch. 53, Section 10, 40 Stat. 279 31-32
Reorganization Plan No. 1 of 1978, Section 2, 92 Stat. 3781 21
Rev. Stat. 566 (later codified at 28 U.S.C. (1925 ed.) 770) ch. 646, Section 39, 62 Stat. 992 33
28 U.S.C. (1952 ed.) 507(a)(3) 14
28 U.S.C. 1292(b) 2
28 U.S.C. 1346(a)(1) 12, 13
28 U.S.C. 1346(a)(2) 12

Constitution, statutes, rules and regulation—Continued

	Page
28 U.S.C. 1346(b)	12
28 U.S.C. (1952 ed.) 1391	13
28 U.S.C. 1402(a)	13
28 U.S.C. 1491	4, 11
28 U.S.C. 1873	34
28 U.S.C. (1952 ed.) 2006	13
28 U.S.C. 2072	34
28 U.S.C. 2402	5, 12, 13, 14
Pub. L. No. 92-261, 86 Stat. 111-112	24
Pub. L. No. 95-256, 92 Stat. 190	20
Fed. R. Civ. P.:	
Rule 38	34
Rule 38(a)	11, 31
5 C.F.R. 713.501, 39 Fed. Reg. 24351 (1974)	25

Miscellaneous:

Civil Actions in District Courts to Recover Taxes: Hearing on S. 252 Before a Subcomm. of the Senate Judiciary Comm., 83d Cong., 1st Sess. (1953)	13, 14
100 Cong. Rec. 11362 (1954)	14
118 Cong. Rec. (1972):	
p. 4919-4920	25
p. 4920	25
p. 7745	23
p. 15894	23
p. 24397	24
123 Cong. Rec. (1977):	
p. 34317-34318	27
p. 34318	27
H. R. Rep. No. 659, 83d Cong., 1st Sess. (1953)	13
H. R. Rep. No. 805, 90th Cong., 1st Sess. (1967)	26
H. R. Rep. No. 93-913, 93d Cong., 2d Sess. (1974)	22, 23, 26
H. R. Rep. No. 93-953, 93d Cong., 2d Sess. (1974)	26

Miscellaneous—Continued Page

H. R. Rep. No. 95-527, 95th Cong., 1st Sess. (1977) 28
H. R. Conf. Rep. No. 950, 95th Cong., 2d Sess. (1978) 28
H. R. Conf. Rep. No. 2276, 83d Cong., 2d Sess. (1954) 14
5 J. Moore, *Federal Practice*:
2d ed. 1979 12
2d ed. 1980 ..... 33, 34
Plumb, *Tax Refund Suits Against Collectors of Internal Revenue*, 60 Harv. L. Rev. 685 (1947).. 13
Richardson, *History, Jurisdiction, and Practice of the Court of Claims*, 17 Ct. Cl. 3 11
S. 3318, 92d Cong., 2d Sess. (1972) 23
S. Rep. No. 115, 83d Cong., 1st Sess. (1953) 13
S. Rep. No. 92-842, 92d Cong., 2d Sess. (1972).... 23
S. Rep. No. 93-690, 93d Cong., 2d Sess. (1974).... 18, 23

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 628 F.2d 59. The opinion of the district court (Pet. App. 27a-32a) and supplemental opinion of the district court (Pet. App. 33a-35a) are reported at 481 F. Supp. 159.

JURISDICTION

The judgment of the court of appeals (Pet. App. 36a-37a) was entered on February 19, 1980, and a petition for rehearing was denied on May 5, 1980 (Pet. App. 38a-40a). On July 29, 1980, the Chief Justice extended the time within which to file a petition for a writ of certiorari to August 18, 1980. The petition was filed on that date and was granted on December 1, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Age Discrimination in Employment Act are set forth in the appendix to the petition for a writ of certiorari (Pet. App. 41a-45a).

STATEMENT

1. Respondent brought this action in the United States District Court for the District of Columbia against the Secretary of the Navy, alleging violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.* She demanded a jury trial, and the government moved to strike that demand (Pet. App. 2a-3a). The district court denied

the motion to strike (Pet. App. 27a-35a) but certified for interlocutory appeal under 28 U.S.C. 1292 (b) the question whether a jury trial is available in an ADEA action against the federal government (Pet. App. 2a). The court of appeals granted the government's petition for interlocutory review (*ibid.*).

2. A divided panel of the court of appeals affirmed (Pet. App. 1a-26a). The majority noted that there is no constitutional basis for jury trials in ADEA cases against the federal government because "the Seventh Amendment does not apply to suits against the Government" (*id.* at 5a). The majority also acknowledged the "absence of explicit statutory authorization" for jury trials in such cases (*id.* at 10a). But the court nonetheless found what it believed to be "enough evidence to support an inference that Congress intended to provide for jury trials" (*ibid.*). It relied on two factors.

First, the court of appeals found that "the very fact that Congress gave jurisdiction over ADEA suits against the federal government to the District Courts rather than the Court of Claims supports the inference that there is a right to jury trial in such cases" (Pet. App. 10a). Second, the court found this inference to be "strengthened" by Congress' authorization in Section 15(c) of the Act, 29 U.S.C. 633a (c), for the award of "*legal* and equitable relief" against the government (Pet. App. 11a; emphasis supplied by the court). The court noted that in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), this Court had relied in part upon the authorization for the award of "legal" relief under Section 7(c) of the Act, 29 U.S.C. 626(c), in finding, as a matter of statutory construction, that there is a right to a jury trial in an ADEA action against a private employer under that section, and the court of appeals reasoned

that Congress must be assumed to have conferred the same right in suits against the federal government because it also used the word "legal" in Section 15(c).

Judge Tamm dissented (Pet. App. 15a-26a). He observed that the legislative history of the Fair Labor Standards Act Amendments of 1974, in which Congress enacted the present Section 15 of the AEDA, 29 U.S.C. 633a, to provide protection against age discrimination for federal employees,[1] "does not mention the issue of jury trials under section [15]" (Pet. App. 19a). Judge Tamm also noted that when Congress amended Section 7(c) of the Act in 1978 to provide for the right to jury trial in cases brought against private employers (and state and local governments), it did not amend Section 15(c) to provide for jury trials in cases brought against the federal government (Pet. App. 21a-22a). This failure to amend Section 15(c), he reasoned, "cannot be deemed inadvertent" because Congress amended Section 15 in other respects (Pet. App. 22a n.8). In Judge Tamm's view, moreover, Congress' decision to extend protection against age discrimination to federal employees "does not necessarily mean Congress intended to establish the same procedures for federal employees to enforce those protections" as were then available to employees in the private sector (*id.* at 20a).

Finally, Judge Tamm found the majority's reliance on *Lorillard* misplaced because the allowance of jury trials against the federal government raises "different concerns" than do jury trials involving private employers (Pet. App. 23a). By the same

---

[1] Section 15 of the ADEA was added by Section 28(b)(2) of the Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 74.

token, Judge Tamm concluded (*id.* at 24a) that the majority erred in focusing on Congress' use of the phrase "legal * * * relief" in Section 15(c). The Court in *Lorillard* found that phrase to be useful in discerning congressional intent regarding the availability of jury trials in suits against private employers because the phrase is a term of art that is relevant in determining when the Seventh Amendment right to a jury trial attaches in suits between private parties. Accordingly, Judge Tamm was of the view that the authorization of "legal" relief has no relevance in construing Section 15(c) because the Seventh Amendment does not apply to suits against the federal government.[2]

SUMMARY OF ARGUMENT

A.

The Seventh Amendment guarantee of trial by jury does not apply in actions against the federal government, because there was no such right in suits against the sovereign when the Amendment was adopted in 1791. As a result, the plaintiff in an action against the federal government has a right to trial by jury only where Congress has affirmatively granted that right by statute.

The general experience has been that when Congress waives the sovereign immunity of the United States, it does not provide for jury trials. Such trials historically have not been available in the broad range of cases subject to the Court of Claims' jurisdiction under 28 U.S.C. 1491, which includes claims

---

[2] The government's petition for rehearing and suggestion for rehearing en banc were denied, with four judges dissenting (Pet. App. 38a-40a).

arising under "any Act of Congress." Jury trials also are barred where the district courts have jurisdiction concurrent with that of the Court of Claims over this same range of cases, as well as under the Federal Tort Claims Act. See 28 U.S.C. 2402.

Congress' reluctance to provide for trial by jury in actions against the government is based in part on the concern that juries might be unduly sympathetic to the plaintiff because of the virtually unlimited ability of the government to satisfy an adverse judgment. Because the availability of jury trials may therefore affect the extent of the government's liability, courts should insist that the intent to confer a right to trial by jury in actions against the United States, like the waiver of sovereign immunity itself, be unequivocally expressed by Congress.

B.

1. Section 15 of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a, establishes separate substantive and procedural provisions relating to age discrimination in federal employment. Subsection (c) of Section 15, which authorizes a person aggrieved to bring a civil action against the government, does not authorize such actions to be tried to a jury. In contrast, Section 7(c) of the Act, which authorizes civil actions against private employers and state and local governments, expressly provides for jury trials. There is nothing in the legislative history to indicate that Congress did not mean what it said in providing for jury trials in cases under Section 7(c) but not in cases against the federal government under Section 15(c). Indeed, the legislative history contains not a single reference to the issue of jury trials in federal sector cases, and

any inferences that may be drawn from the legislative history on this question cut against the availability of jury trials.

2. a. As originally enacted in 1967, the ADEA applied only to the private sector, not to federal, state, and local government. Section 7 of the Act, 29 U.S.C. 626, incorporated the enforcement scheme utilized to enforce a private employer's liability for unpaid minimum wages and overtime compensation under the Fair Labor Standards Act (FLSA). In *Lorillard* v. *Pons*, 434 U.S. 575 (1978), the Court held that, because a right to trial by jury had been recognized in actions to recover unpaid minimum wages and overtime compensation from private employers under the FLSA, Congress must have intended the same result in an action against a private employer under Section 7 of the ADEA. The holding in *Lorillard* was codified by Congress in 1978 when it amended Section 7(c) of the ADEA to provide for jury trials in actions brought under that section.

b. In 1974, Congress expanded the definition of the term "employer" in the ADEA to include state and local governments, thereby extending the then-existing substantive and procedural provisions of the Act, including Section 7(c), to cover state and local government employees. But Congress added a separate Section 15 to the ADEA in 1974 governing age discrimination in federal employment. Section 15 contains its own substantive and procedural provisions, and, unlike Section 7, it does not incorporate the FLSA enforcement scheme. Rather, Section 15 is patterned after Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, which was added in 1972 to prohibit other forms of discrimination in federal employment. Because a right to trial by jury

had not been recognized even in suits against private employers under Title VII, as it had been under the FLSA, Congress' decision to pattern Section 15 of the ADEA after Title VII reinforces the conclusion that jury trials are not available against the federal government.

c. Congress declined an opportunity to extend the jury trial right to the federal sector when it amended the ADEA in 1978. Prior to the decision in *Lorillard*, the Senate, but not the House, had included in a pending bill to revise the ADEA an amendment to Section 7(c) to provide for jury trials. After the decision in *Lorillard*, the Conference Committee reported the bill containing a somewhat revised version of the jury trial provision in Section 7(c) that had been passed by the Senate. The Conference Committee also made several additions to Section 15, but did not include a provision for jury trials in civil actions brought against the federal government under that section. Significantly, the Conference Committee recommended and Congress enacted a new Section 15(f), 29 U.S.C. (Supp. II) 633a(f), providing that federal personnel actions covered by Section 15 are not subject to any other section of the ADEA, with one exception not relevant here. Since this new Subsection (f) clearly emphasized for the Conference Committee and the entire Congress that Section 15 is wholly self-contained and therefore unaffected by the jury trial and other procedural provisions applicable in the private sector under Section 7, Congress could not have overlooked the need to amend Section 15 to provide for jury trials in federal sector cases if it wished to do so. Again, the only inference that can be drawn is that Congress

chose to follow the established practice of not allowing jury trials in actions against the United States.

C.

1. Despite the absence of any indication in the text or legislative history of Section 15 of an intent to confer a right to trial by jury, the court of appeals found that Congress' provision in Section 15(c) for ADEA cases to be brought against the federal government "in any Federal district court of competent jurisdiction," rather than in the Court of Claims (where jury trials historically have not been available), supported an inference that Congress intended cases brought under Section 15(c) to be tried to a jury. But Congress apparently never considered the possibility of Court of Claims jurisdiction under Section 15, and there is no indication that Congress believed the reference to district court jurisdiction had any significance for jury trial purposes.

Furthermore, there are a number of reasons, wholly unrelated to jury trials, why Congress may have provided for district court jurisdiction in federal sector ADEA suits. District courts (along with state courts) already had jurisdiction over private sector ADEA cases under Section 7(c). It is therefore not surprising that Congress took the same approach under Section 15(c). Suits under Title VII, after which Section 15 is patterned, are also brought in federal district court, and Congress may simply have wished to follow the same course under the ADEA. And, finally, Congress may have thought district court jurisdiction appropriate because Section 15(c) authorizes the award of equitable relief, which the Court of Claims ordinarily does not grant.

Thus, this case is not like *United States* v. *Pfitsch*, 256 U.S. 547 (1921), where Congress actually rejected a proposal to confer concurrent jurisdiction on the district courts and Court of Claims under the Tucker Act and instead conferred a new exclusive jurisdiction on the district courts. In the particular circumstances of that case, the Court could conceive of no rational ground for conferring exclusive jurisdiction on the district courts except to provide for jury trials.

2. Nor, contrary to the court of appeals' holding, does the provision in Section 15(c) for the award of "legal" as well as equitable relief support an inference of an affirmative grant of a right to trial by jury in actions brought against the federal government. In *Lorillard*, the authorization for the award of "legal" relief was significant only because of the presence of a constitutional question in the case. The Court observed that where legal relief is granted in litigation between private parties, the Seventh Amendment ensures a right to trial by jury. Accordingly, the Court reasoned, Congress must have been aware of the significance of the use of the word "legal" in that context and must have intended that actions under Section 7(c) be tried to a jury. But the Seventh Amendment has no application in actions at law against the federal government, and Congress therefore could not have attached any particular significance to the use of the term "legal" in Section 15(c).

ARGUMENT

TRIAL BY JURY IS NOT AVAILABLE IN SUITS AGAINST THE FEDERAL GOVERNMENT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

A. There Is No Right To Trial By Jury In Actions Against The United States Unless Congress Affirmatively Grants That Right In The Applicable Legislation

It is well settled that the Seventh Amendment right to trial by jury in suits at common law does not extend to civil actions against the federal government.[3] As this Court observed in *Galloway* v. *United States*, 319 U.S. 372, 388-389 (1943) (footnote omitted):

> The suit is one to enforce a monetary claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign. Whatever force the Amendment has therefore is derived because Congress, in the legislation cited, has made it applicable.

See also *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962) (Harlan, J.); *McElrath* v. *United States*,

---

[3] The Seventh Amendment provides in pertinent part: "In Suits at common law, * * * the right of trial by jury shall be preserved * * *." This Court has explained that, "by referring to the 'common law,' the Framers of the Seventh Amendment were concerned with preserving the right of trial by jury in civil cases where it existed at common law * * *." *Colgrove* v. *Battin*, 413 U.S. 149, 155 (1973) (emphasis in original omitted). See also *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 449, 459 (1977).

102 U.S. 426, 440 (1880). This is but a particular application of the general principle that "the United States, as sovereign, 'is immune from suit save as it consents to be sued * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.' " *United States* v. *Testan*, 424 U.S. 392, 399 (1976), quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). See also *United States* v. *Mitchell*, 445 U.S 535, 538 (1980); *McElrath* v. *United States*, *supra*. Accordingly, if Congress waives the government's immunity from suit, there is a right to trial by jury only where availability of that right is one of "the terms of [the government's] consent to be sued." 424 U.S. at 399. This conclusion comports with Fed. R. Civ. P. 38(a), which provides for trial by jury only "as declared by the Seventh Amendment to the Constitution *or as given by a statute of the United States* * * *" (emphasis added).

The general experience has been that when Congress waives the sovereign immunity of the United States, it does *not* provide for trial by jury. For example, jury trials historically have not been available in the Court of Claims in the broad range of cases within its jurisdiction under 28 U.S.C. 1491—*i.e.*, all claims against the United States "founded either upon the Constitution, or *any* Act of Congress, * * * or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort" (emphasis added). See, *e.g.*, *Glidden Co.* v. *Zdanok*, *supra*, 370 U.S. at 572; *McElrath* v. *United States*, *supra*, 102 U.S. at 439-440; Richardson, *History, Jurisdiction, and Practice of the Court of Claims*, 17 Ct. Cl. 3, 24 (1882). Similarly, Congress has provided that there is no right to trial by jury in this same broad range of cases where the district courts have concurrent

jurisdiction because the amount in controversy does not exceed $10,000. See 28 U.S.C. 1346(a)(2) and 2402. And in cases against the United States sounding in tort (see 28 U.S.C. 1346(b))—apparently the only general category of cases involving legal relief not covered by the foregoing grants of jurisdiction to the Court of Claims and district courts—Congress likewise has provided that the trial shall be to the court without a jury. 28 U.S.C. 2402.[4] Indeed, it appears that Congress has departed from this pattern only once in recent times, when it amended 28 U.S.C. 2402 in 1954 to permit jury trials in tax refund suits in district court under 28 U.S.C. 1346(a)(1). See Act of July 30, 1954, ch. 648, Section 2(a), 68 Stat. 589. The House Committee observed that the legislation would establish a "wholly new precedent" because "for the first time jury trials would be per-

---

[4] As Judge Tamm observed in dissent (Pet. App. 25a-26a, quoting 5 J. Moore, *Federal Practice* ¶ 38.31[2], at 234-235 (2d ed. 1979); footnote omitted):

> Jury trials, though favored, are not always permitted. This favor does not extend to suits against the government. "[W]hile statesmen and jurists are often wont to extol the virtues of jury trial, they are not accustomed to extend the virtues to actions against the United States, either in the Court of Claims or in the district courts."

Accordingly, there is no basis for the court of appeals' suggestion (Pet. App. 9a n.4) that a supposed "preference for jury trials in our jurisprudence would support a presumption in favor of such trials" when the government is sued. The error in this assertion is sufficiently demonstrated by the fact that in damage actions sounding in tort or contract—precisely the type of common law suits in which the Seventh Amendment would guarantee a right to trial by jury where private parties are involved—Congress provided in 28 U.S.C. 2402 that trial would be to the court sitting without a jury.

mitted in suits against the Government." H.R. Rep. No. 659, 83d Cong., 1st Sess. 3 (1953).[5]

Congress' demonstrated reluctance to provide for jury trials against the United States no doubt stems from the fear, articulated when it fashioned the narrow exception in 28 U.S.C. 2402 for tax refund cases, that juries "might tend to be overly generous because of the virtually unlimited ability of the Government to pay the verdict." H.R. Rep. No. 659, *supra*, at 3;[6]

---

[5] But see pages 31-34, *infra*.

[6] Prior to the time the 1954 legislation was enacted, a taxpayer could bring a common law action against the collector of revenue, in his personal capacity, to recover taxes the collector had illegally or erroneously received. See H.R. Rep. No. 659, *supra*; S. Rep. No. 115, 83d Cong., 1st Sess. 2 (1953). Any judgment awarded against the collector was paid by the United States where the district court certified that there was probable cause for the collector's actions or that he was following instructions. H.R. Rep. No. 659, *supra*, at 3-5; 28 U.S.C. (1952 ed.) 2006. But because the action was one at law against the collector in his personal capacity, the plaintiff had a right to trial by jury. *Wickwire* v. *Reinecke*, 275 U.S. 101, 104-105 (1927); *Civil Actions in District Courts to Recover Taxes: Hearing on S. 252 Before a Subcomm. of the Senate Judiciary Comm.*, 83d Cong., 1st Sess. 3 (1953). (hereinafter referred to as "*Hearing*"). See generally Plumb, *Tax Refund Suits Against Collectors of Internal Revenue*, 60 Harv. L. Rev. 685 (1947). Such a common law action, however, had to be brought in the district court in which the director resided (see 28 U.S.C. (1952 ed.) 1391)), which might have proved inconvenient for the taxpayer. H.R. Rep. No. 659, *supra*, at 2; *Hearing*, *supra*, at 3-6.

Congress decided to confer a statutory right to trial by jury in actions against the United States under 28 U.S.C. 1346(a)(1), which could be brought in the district where the taxpayer resided (28 U.S.C. 1402(a)), in order to prevent the taxpayer from having to forgo a jury trial in order to sue in a convenient forum. Since a jury trial was already available in an action brought against the director in his personal capacity, Congress believed that the amendment

see also *Domenico Ruggiero* v. *Compania Peruana de Vapores "Inca Capac Yupanqui,"* Nos. 80-7595, 7597 and 7599 (2d Cir. Jan. 15, 1981), slip op. 1060. This apprehension, rooted in common sense, counsels caution in finding a right to jury trial against the government. The Court has emphasized that waivers of sovereign immunity cannot be implied, but must be "unequivocally expressed." *United States* v. *Mitchell, supra*, 445 U.S. at 538, quoting *United States* v. *King*, 395 U.S. 1, 4 (1969). And even where the waiver is so expressed, it is to be strictly construed. *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). The purpose of these rules of construction is to conserve the public fisc and to limit recovery to those situations in which it may confidently be concluded that Congress has determined the government should be liable. See, *e.g.*, *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68-69 (1955).

Like the waiver of immunity from suit itself, "limitations and conditions upon which the Government consents to be sued must be strictly observed

---

would not have much of a practical effect—especially because the United States defended the action against the director (*Hearing, supra*, at 6; 28 U.S.C. (1952 ed.) 507(a)(3)) and ordinarily paid the judgment in either event. See H.R. Conf. Rep. No. 2276, 83d Cong., 2d Sess. 2 (1954). Congress also reasoned that there was no greater danger of excessive verdicts as a result of jury trials where the action was brought against the United States rather than the director, because in either case the recovery was limited to the amount of taxes illegally or erroneously collected (*ibid.*). In these circumstances, the House conferees finally retreated from their position—which had held up passage of the bill for a year (100 Cong. Rec. 11362 (1954))—that "it would be a harmful precedent to permit jury trials in cases of this class" (H.R. Conf. Rep. No. 2276, *supra*, at 2). The unique considerations that prompted the exception in 28 U.S.C. 2402 obviously have no application in the present case.

and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). See also *United States* v. *Kubrick*, *supra*, 444 U.S. at 117-118. One such condition commonly imposed—trial to the court rather than by jury—conserves the public fisc by helping to ensure that a judgment will be awarded against the United States only in truly meritorious cases, as determined by impartial judges, not on the basis of what a jury might perceive to be the deep pocket of the government. Therefore, Congress' decision whether to grant or withhold a right to jury trial under a particular statute concerns more than an incidental matter of procedure, as the court of appeals appeared to believe (Pet. App. 8a-9a). That decision may well affect the extent of the government's liability in an entire category of cases; at the very least, Congress is entitled to conclude that it might. Because of this potential effect on the government's monetary liability, the Court must insist that the grant of a right to trial by jury in suits against the federal government, like the consent to suit itself, be "unequivocally expressed." Such a rule is especially appropriate in light of Congress' ordinary practice in the past of withholding the jury trial right in cases against the government.[7]

---

[7] The court of appeals rejected the suggestion that the United States enjoys a "sovereign immunity from jury trial that can only be waived by explicit statutory language or legislative history" (Pet. App. 8a). In the court's view (*id.* at 8a-9a), the doctrine of sovereign immunity bars suits against the government, but not any particular mode of trial in the event the bar to suit is waived.

We leave for others to decide whether the proper description of the settled rule is "sovereign immunity from jury trial." For whatever the label, it is clear that the doctrine of sovereign immunity must inform the Court's decision in

As we demonstrate below, when it enacted and amended the ADEA Congress did not depart from its usual practice in this area by affirmatively and unequivocally granting a right to trial by jury in actions against the federal government.

B. Section 15 Of The Age Discrimination In Employment Act Does Not Provide For A Right To Trial By Jury

1. *The Language of the Act*

It is by now axiomatic that "the starting point for interpreting a statute is the language of the statute itself." *CPSC* v. *GTE Sylvania, Inc.*, No. 79-521 (June 9, 1980), slip op. 5. See also *Rubin* v. *United States*, No. 79-1013 (Jan. 21, 1981), slip op. 5; *Lewis* v. *United States*, 445 U.S. 55, 60 (1980). Section 15 of the ADEA, 29 U.S.C. 633a, prohibits discrimination in federal employment on the basis of age. Section 15(c), which sets forth the judicial en-

---

this case. It is precisely because of the government's sovereign immunity from suit that the Seventh Amendment and its constitutionally mandated presumption in favor of jury trials do not apply in actions at law against the United States. Because there is no generally applicable jury trial right that automatically attaches when the United States waives its immunity from suit, the actions to which Congress has consented will not be tried to a jury unless Congress goes further and affirmatively so provides in the legislation creating the cause of action. We deem it of little importance whether the requisite statutory grant of the jury trial right is viewed as a "waiver" of an otherwise applicable "sovereign immunity" from jury trials or, instead, as a condition to recognition of a right to jury trial that is necessary *because* of the doctrine of sovereign immunity. In either event, accepted principles of sovereign immunity require that a statutory grant of the right not be lightly implied.

forcement mechanism to support this substantive guarantee, provides that any person aggrieved "may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes" of the Act. Nothing in this or any other portion of Section 15 provides that the civil action may be tried to a jury.

In contrast, Section 7(c) of the Act, 29 U.S.C. (Supp. II) 626(c), which authorizes civil actions against private employers and state and local governments, *expressly* provides for trial by jury. Thus, Congress demonstrated in the very statute involved here that it knew how to provide a statutory right to trial by jury when it wished to do so; yet it failed to furnish such a right in Section 15(c). See *Fedorenko* v. *United States*, No. 79-5602 (Jan. 21, 1981), slip op. 20-21. For this reason, the text of the Act would seem to furnish a complete answer to respondent's contention that she is entitled to a jury trial in this case.

But no statute is so plain that resort to the legislative history is forbidden. See, *e.g.*, *United States* v. *Culbert*, 435 U.S. 371, 374 n.4 (1978); *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976). As we now show, nothing in the legislative history supports respondent's construction of the Act. Like the court of appeals, respondent has been unable to cite even a single reference in the pertinent materials to the issue of jury trials in ADEA actions brought against the federal government, much less an "unequivocal expression" of intent to confer that right. Indeed, any inferences that may be drawn from the legislative history cut strongly against respondent's position.

2. *The Legislative History*

a. Background: Section 7 of the 1967 Act and the *Lorillard* Decision

When the ADEA was first enacted in 1967, the definition of the term "employer," to which the Act's prohibitions applied (Section 4(a), 29 U.S.C. 623 (a)), expressly excluded the United States or a state or political subdivision. See Pub. L. No. 90-202, Section 11, 81 Stat. 605, 29 U.S.C. (1970 ed.) 630 (b).[8] Section 7 of the Act contained the provisions for its enforcement in the private sector. Section 7(b) then provided, as it does now, that the Act was to be enforced in accordance with the "powers, remedies, and procedures" utilized in enforcing the Fair Labor Standards Act (FLSA) (29 U.S.C. 201 *et seq.*),[9] that violations of the ADEA were to be

---

[8] Given this express exclusion on the face of the Act, there is no basis for respondent's contention, drawn from a committee report on the 1974 amendments to the Act, that "the omission of federal employees from the ADEA as originally enacted 'did not represent a conscious decision by Congress to limit the ADEA to employment in the private sector'" (Br. in Opp. 6, quoting S. Rep. No. 93-690, 93d Cong., 2d Sess. 55 (1974)). See *United States Railroad Retirement Board* v. *Fritz*, No. 79-870 (Dec. 9, 1980), slip op. 12; *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979).

[9] The key FLSA enforcement provisions for purposes of private sector ADEA suits are those set forth in Sections 16(b) and (c), 29 U.S.C. 216(b) and (c). Section 16(b) confers a right of action for damages (including liquidated damages), restricts the availability of class action suits, and provides for the award of a reasonable attorney's fee and costs. This right of action is terminated, however, if the Secretary of Labor (now the EEOC, see note 11, *infra*) seeks an injunction against the employer in accordance with Section 17 of the FLSA, 29 U.S.C. 217. Moreover, under Section 16(c), the Secretary of Labor (now the EEOC) may sue on behalf of an employee, in which case the employee's right of action is also terminated.

deemed violations of Section 15 of the FLSA (29 U.S.C. 215), and that amounts owing to an employee were to be deemed unpaid minimum wages or overtime compensation for purposes of recovery pursuant to Sections 16 and 17 of the FLSA (29 U.S.C. 216 and 217). Section 7(c) authorized the person aggrieved to bring a civil action in a court of competent jurisdiction for such "legal or equitable relief" as would effectuate the purposes of the Act, and Section 7(b) authorized the court to award such relief, including "judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation * * *."

Section 7(c), as originally enacted in 1967, did not expressly provide for trial by jury. However, in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), the Court held that the plaintiff in a suit against a private employer under Section 7(c) has a right to a jury trial. The Court inferred such a right as a matter of statutory construction, even in the absence of language in the Act expressly so providing, because it was "fairly possible" to interpret Section 7(b) and (c) as affording that right and thereby to avoid the constitutional question of whether the Seventh Amendment guarantee applied. 434 U.S. at 577, quoting *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971), and *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

In inferring the right to jury trial, the Court relied principally on the incorporation of FLSA procedures into Section 7(b) and the provision for lost wages to be treated as unpaid minimum wages or overtime compensation to be recovered pursuant to the FLSA. The Court observed that it was well es-

tablished prior to enactment of the ADEA in 1967 that there was a right to jury trial in private actions under the FLSA, and it concluded that Congress must have intended the same result to obtain in actions brought under the ADEA. 434 U.S. at 581-583. The Court found this inference of a jury trial right to be "buttressed" by the authorization in Section 7(b) and (c) for the award of "legal" as well as equitable relied. The Court assumed that Congress knew that a jury trial is guaranteed by the Seventh Amendment when legal rights are determined and legal relief is available and therefore must have intended that there would be a jury trial on demand in an action brought to enforce liability for lost wages deemed to be unpaid minimum wages or overtime compensation under the FLSA. 434 U.S. at 583. The result in *Lorillard* was codified by Congress in 1978, when it added a new paragraph (2) to Section 7(c) to provide for trial by jury in an action for recovery of amounts owing as a result of a violation.[10]

b. The 1974 Amendments

In Section 28(b)(2) of the Fair Labor Standards Act (FLSA) Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 74, Congress added an entirely new

---

[10] Section 4(a) of Pub. L. No. 95-256, 92 Stat. 190, redesignated the civil action provision in Section 7(c) as paragraph (1) of that section and added a new paragraph (2) affording the jury trial right. Paragraph (2), as codified at 29 U.S.C. (Supp. II) 626(c)(2), provides:

> In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

Section 15 to the ADEA governing age discrimination in federal employment. 29 U.S.C. 633a. This new section did not extend the coverage of the original ADEA provisions to the federal sector by expanding the definition of the term "employer" to include the federal government, as was done in extending coverage to state and local governments. See Section 11(b) of the Act, 29 U.S.C. 630(b). Instead, Congress prescribed a distinct statutory scheme applicable only to the federal sector.

Subsection (a) of Section 15 states a separate substantive policy providing that all personnel actions affecting federal employees or applicants for employment "shall be made free from any discrimination based on age." 29 U.S.C. 633a(a). Subsection (b) of Section 15 directs the Civil Service Commission (now the Equal Employment Opportunity Commission)[11] to issue implementing regulations and orders and to enforce the provisions of subsection (a) in individual cases "through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies * * *" of Section 15. 29 U.S.C. 633a(b). There is no comparable provision for administrative adjudication of complaints in the case of private or state and local government employees. See Section 7(d) of the ADEA, 29 U.S.C. 626(d). Subsection (c) of Section 15 contains a separate provision authorizing a person aggrieved by age discrimination in federal employment to bring a civil action in federal district court (29 U.S.C. 633a(c)); Congress did not simply provide for

---

[11] The functions of the Civil Service Commission under Section 15(b) of the ADEA and the functions of the Secretary of Labor under other Sections of the Act were transferred to the EEOC by Section 2 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781.

federal sector ADEA actions to be brought pursuant to Section 7(c) of the Act in the same manner as those against private employers.[12] Significantly, moreover, Section 15 does not incorporate FLSA "powers, remedies, and procedures," does not provide that violations of the section are to be treated as violations of the FLSA, and does not refer to "amounts owing" as a result of a violation of Section 15 or deem any such amounts to be unpaid minimum wages or overtime compensation for purposes of recovery pursuant to the FLSA. Indeed, as noted above, subsection (b) of Section 15 provides for hiring and reinstatement of employees "with or without backpay," thereby establishing that the recovery of lost wages in federal sector cases under Section 15 is a matter of sound equitable discretion (see, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415-~~442~~ (1975); see pages 39-40, *infra*), not an absolute entitlement, as under Section 7(b) and the FLSA. Thus, it is clear that Congress separated out federal sector cases for quite different treatment. See *Bradley* v. *Kissinger*, 418 F. Supp. 64, 66 (D.D.C. 1976).[13] The legislative history of the 1974 Amendments confirms that the decision to do so was deliberate.

422

---

[12] Compare 42 U.S.C. 2000e-16(c) and (d).

[13] The House Report on the 1974 FLSA Amendments states that Section 28 "extends the provisions of the [ADEA] to State and local governments and their related agencies." H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 16 (1974). In contrast, the Report remarks that Section 28 "[s]tates a policy of nondiscrimination on account of age in the federal government, and authorizes the U.S. Civil Service Commission to enforce that policy" (*ibid.*). The report therefore distinguishes between an "extension" of the coverage of ADEA itself and the new "policy" in Section 15, to be enforced by the Civil Service Commission.

The first attempt to prohibit age discrimination in federal employment was a bill introduced by Senator Bentsen on March 9, 1972 (S. 3318, 92d Cong., 2d Sess.; 118 Cong. Rec. 7745 (1972)). This bill simply would have amended the definition of "employer" in Section 11(b) of the Act, 29 U.S.C. 630 (b), to include the federal government, as well as state and local governments. The result would have been to bring federal employees directly under the substantive antidiscrimination provisions in Section 4 of the Act and, we may assume, the procedural provisions in Section 7. But Senator Bentsen subsequently submitted a revised version of his bill in the form of an amendment to pending FLSA amendments. See 118 Cong. Rec. 15894 (1972). In contrast to Senator Bentsen's original bill, this amendment to the ADEA proposed an expansion of the definition of the term "employer" only with respect to state and local governments; ADEA coverage of federal employees was to be accomplished by the addition of an entirely new and separate section to the Act—the present Section 15. Senator Bentsen's amendment was included in the FLSA bill reported by the Committee on Labor and Public Welfare, S. Rep. No. 92-842, 92d Cong., 2d Sess. 93-94 (1972), and it remained in this form until the bill ultimately was passed in 1974.[14]

Sections 15(a) and 15(b) of the ADEA, as offered by Senator Bentsen and as finally enacted, are in all material respects patterned after Section 717(a) and (b) of the Civil Rights Act of 1964, as amended

---

[14] The 1972 bill was not enacted, but the same provisions were eventually included in the House and Senate bills reported out of committee in 1974. See H.R. Rep. No. 93-913, 93d Cong., 2d Sess. 16, 40 (1974); S. Rep. No. 93-690, 93d Cong., 2d Sess. 55-56 (1974). These provisions remained in the final enactment. See Pub. L. No. 93-259, Section 28(a), and (b)(2), 88 Stat. 74.

in March 1972,[15] which extend the protection of Title VII to federal employees. 42 U.S.C. 2000e-16(a) and (b). Indeed, Senator Bentsen, the principal sponsor of Section 15 of the ADEA, explained that "[t]he *measures* used to protect Federal employees [from age discrimination] would be substantially similar to those incorporated * * *" in the recently passed amendments to Title VII. 118 Cong. Rec. 24397 (1972) (emphasis added).[16] It is clear, then, that in federal sector ADEA cases Congress deliberately departed from the FLSA model it previously had followed in ADEA cases involving private employers (see *Lorillard* v. *Pons*, *supra*, 434 U.S. at 578-580) and adopted instead the Title VII enforcement scheme.[17]

---

[15] See Pub. L. No. 92-261, 86 Stat. 111-112.

[16] This method of bringing federal employees within the protection of the ADEA—by adding a separate section and establishing different procedures patterned after Title VII—stands in marked contrast to the method Congress adopted in the same Act for extending FLSA coverage to federal employees. There, Congress brought federal employees under then-existing FLSA provisions applicable to private employees by amending the definition of the term "employer" to include the federal government. See Pub. L. No. 93-259, Section 5(a), 88 Stat. 56, 29 U.S.C. 203(d) and (e)(2) ("employer" redefined to include "public agency"; "individual employed by a public agency" defined to include federal employees as well as state and local government employees).

[17] It is understandable that Congress would pattern enforcement of the ADEA in the federal sector after Title VII. In *Lorillard* v. *Pons*, *supra*, the Court explained that Congress' decision to pattern procedures followed in ADEA cases against private employers after procedures used under the FLSA reflected "Congress' desire to use an existing statutory scheme and a bureaucracy with which employers and employees would be familiar" (434 U.S. at 578-579). Since

This departure is especially pertinent to the jury trial issue in this case. The lower courts had held prior to enactment of the ADEA that there is a right to trial by jury in FLSA cases against private employers, and for this reason the Court concluded in *Lorillard* v. *Pons, supra,* that there is a similar right under Section 7 of the ADEA by virtue of Congress' incorporation of the FLSA enforcement scheme. 434 U.S. at 580-583 & n.7. In contrast, a right to trial by jury has not been recognized in cases under Title VII, after which Section 15 of the ADEA is patterned. See *Lorillard* v. *Pons, supra,* 434 U.S. at 583-584; *Great American Fed. Savings & Loan Ass'n* v. *Novotny,* 442 U.S. 366, 375 & n.19 (1979); *Curtis* v. *Loether,* 415 U.S. 189, 196-197 & n.13 (1974); see also *Blum* v. *Gulf Oil Corp.,* 597 F.2d 936, 938 (5th Cir. 1979); *Harmon* v. *May Broadcasting Co.,* 583 F.2d 410 (8th Cir. 1978). What is more, during floor consideration of the 1972 amendments to Title VII, the Senate rejected an amendment that would have conferred a statutory right to trial by jury in Title VII cases. 118 Cong. Rec. 4919-4920 (1972). Senator Javits, in opposing the amendment, observed that it would impose "what would be a special requirement in these cases, as distinguished from the antidiscrimination field generally, of jury trial." *Id.*

Congress had only recently extended Title VII to cover other types of discrimination by the federal government and charged the Civil Service Commission with enforcement responsibilities, it was sensible for Congress to use this "existing statutory scheme" and bureaucracy in age discrimination cases as well. The Civil Service Commission's implementing regulations, promulgated soon after passage of the 1974 amendments, reflected this purpose, for they essentially made existing EEO regulations applicable to ADEA cases. 5 C.F.R. 713.501, as added, 39 Fed. Reg. 24351 (1974).

at 4920. Therefore, the only inference with respect to the availability of jury trials that may be drawn from Congress' adoption of Title VII procedures, in lieu of FLSA procedures, in federal sector ADEA cases is that Congress did *not* intend to confer a right to trial by jury in such cases. See *Lorillard* v. *Pons*, *supra*, 434 U.S. at 581, 583-585.

c. The 1978 Amendments

Any remaining doubt on the intention of Congress not to allow jury trials in federal sector ADEA cases is dispelled by consideration of the circumstances surrounding passage of the 1978 amendments to the Act.

As we have explained, following the 1974 amendments, neither Section 7(c) nor Section 15(c) of the ADEA mentioned a right to trial by jury, and nothing in the legislative history of the 1967 Act or the 1974 amendments suggests that Congress had ever considered the matter. See, *e.g.*, H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967); H.R. Rep. No. 93-913, 93d Cong., 2d Sess. (1974); H.R. Rep. No. 93-953, 93d Cong., 2d Sess. (1974). Indeed, Congress did not address the availability of jury trials in ADEA suits until 1977, during floor consideration of a bill to revise the ADEA. Senator Kennedy, in response to conflicting court of appeals' decisions,[18] offered an amendment to "clarify" Section 7(c) of the Act in order to guarantee the availability of jury trials.

---

[18] Compare *Rogers* v. *Exxon Research & Eng'r Co.*, 550 F.2d 834 (3d Cir. 1977) (right to jury trial), cert. denied, 434 U.S. 1022 (1978), and *Pons* v. *Lorillard*, 549 F.2d 950 (4th Cir. 1977) (same), aff'd, 434 U.S. 575 (1978), with *Morelock* v. *NCR Corp.*, 546 F.2d 682 (6th Cir. 1976) (no right to jury trial), vacated and remanded, 435 U.S. 911 (1978).

See 123 Cong. Rec. 34317-34318 (1977). The Senate adopted this amendment. *Id.* at 34318.[19] The House bill, however, did not contain a comparable provision.

Before the bill to amend the ADEA was reported out of the Conference Committee, this Court rendered its decision in *Lorillard* v. *Pons*, *supra*, holding as a matter of statutory construction that an employee has a right to trial by jury in an ADEA suit brought against a private employer under Section 7(c). After the *Lorillard* decision, the Conference Committee recommended and Congress enacted the present Section 7(c)(2) of the Act, which is a somewhat revised version of the jury trial amendment passed by the Senate. But the Conferees did not recommend, and Congress did not enact, any corresponding amendment of Section 15(c) to provide for jury trials in federal sector cases.

As Judge Tamm noted, Congress' failure to amend Section 15(c) to provide for jury trials in federal sector cases "cannot be deemed inadvertent" (Pet. App. 22a-23a n.8):[20]

> The Kennedy amendment, though adopted on the Senate floor with little debate, received careful consideration in the conference committee, which altered it to clarify the right to jury trial when

---

[19] Senator Kennedy made clear that the Senate's action was not intended "to define other circumstances under which a jury trial is required" and that the decisional law holding that no jury trial is required under Title VII—after which Section 15 of the ADEA was patterned—"is unaffected by this section." 123 Cong. Rec. 34318 (1977).

[20] We do not suggest, of course, that legislative inadvertence properly could support a conclusion that Congress had affirmatively authorized trial by jury in suits against the federal government.

> liquidated damages were involved. *See* H.R. [Conf.] Rep. No. 950, 95th Cong., 2d Sess. 13-14 [(1978)[21]] * * *. The conference committee also altered [Section 15], amending subsection (a) and adding subsections (f) and (g) to authorize studies of age discrimination. *Id.* In amending both sections as it did, Congress could not have overlooked the need to amend [Section 15(c)] to allow jury trials for government employees if it had so wished.

Congress' addition of Subsection (f) to Section 15 renders the failure to amend Subsection (c) of that Section particularly significant. Subsection (f) provides that "[a]ny personnel action of any department, agency or other entity referred to in Subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provision of section 631(b) of this title and the provisions of this section." 29 U.S.C. (Supp. II) 633 a(f).[22] The Conference Report states that this provision, which was contained in the House bill but not the Senate bill, "*makes it clear that section 15 of the act relating to federal employment is independent of any other section of the act,* except section 12(b) which contains the age limitation for federal employees." H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 11 (1978) (emphasis added). See also H.R. Rep. No. 95-527, 95th Cong., 1st Sess. 11 (1977)

---

[21] The question of the availability of jury trials on claims for liquidated damages was left open by the Court in *Lorillard*. See 434 U.S. at 577 n.2.

[22] Section 12(b), 29 U.S.C. (Supp. II) 631(b), provides that Section 15 applies only to federal employees or applicants for federal employment who are at least 40 years of age. The significance of Section 12(b) is that it contains no upper age limit, unlike Section 12(a), which applies to employees in the private sector and in state and local government.

("Section 15 * * * is complete in itself"). Since Congress was given this vivid and contemporaneous reminder that other procedural and substantive provisions of the Act do not apply to personnel practices of the federal government, Judge Tamm surely is correct that "Congress could not have overlooked the need to amend [Section 15(c)] to allow jury trials for government employees if it had so wished" (Pet. App. 22a-23a n.8).[23] And, of course, it is not surprising that Congress did not do so, in view of its virtually uniform practice of not allowing jury trials in actions against the federal government.

In sum, the text and legislative history of the 1974 and 1978 amendments to the ADEA are devoid of the slightest expression of intent to confer a right to jury trial in actions against the federal government; at every turn, the signs point in the opposite direction.

C. The Court Of Appeals Erred In Implying A Right To Trial By Jury From The Act's Provision For Jurisdiction In Federal District Courts And Its Authorization For The Award Of "Legal" Relief In Federal Sector Cases

Despite the absence of any expression of congressional intent to confer a right to trial by jury in ADEA suits against the federal government, the court of appeals nonetheless held that such a right could be inferred from the language in Section 15(c) permitting such actions to be brought in "any Federal district court of competent jurisdiction" and providing for the award of "legal or equitable relief." But

---

[23] See also *Edmondson* v. *Simon*, 87 F.R.D. 487, 489-490 (N.D. Ill. 1980), reprinted in the appendix to our reply brief at the petition stage, at 5a-6a.

these wholly unexceptional features of Section 15(c) do not reflect an intent to convey the consent to trial by jury that Congress has withheld with respect to virtually every other cause of action against the federal government.

1. *The Conferring of Jurisdiction on the District Courts*

The court of appeals' inference of a right to jury trial in this case was based primarily on the "fact that Congress gave jurisdiction over ADEA suits against the federal government to the District Courts rather than the Court of Claims" (Pet. App. 10a). The court of appeals cited nothing in the legislative history to support this inference, and we have found nothing. Indeed, there is no indication in the legislative history that Congress ever considered vesting jurisdiction in the Court of Claims.

There are a number of reasons, wholly unrelated to the availability of jury trials, why Congress may have chosen to limit jurisdiction to federal district courts. District courts (along with state courts) already had jurisdiction of private sector ADEA cases under Section 7(c).[24] Congress may simply have decided to follow the same course in federal sector cases and referred specifically to federal district courts only to ensure that state courts would not have jurisdiction of actions brought against the federal government.[25] Moreover, exclusive district court jurisdiction

---

[24] Section 7(c) provides for the bringing of a civil action in "any court of competent jurisdiction." 29 U.S.C. (Supp. II) 626(c).

[25] A grant of jurisdiction to federal district courts in actions between private parties certainly does not imply a concomitant grant of a statutory right to jury trial in those actions. Thus, if Congress simply provided for district court

under Section 15(c) of the ADEA is consistent with the jurisdictional references in Title VII of the Civil Rights Act of 1964 (see 42 U.S.C. 2000e-5(f)(3) and 16(c)), under which there is no right to jury trial. Yet another explanation for district court jurisdiction is that the district courts are accustomed to awarding equitable relief of the type authorized under Section 15(c), but the Court of Claims is not. See *United States* v. *King*, 395 U.S. 1, 3 (1969).[26]

In any event, Rule 38(a) of the Federal Rules of Civil Procedure provides that the right to trial by jury "as declared by the Seventh Amendment to the Constitution or as *given by a statute of the United States* shall be preserved to the parties inviolate" (emphasis added). This language certainly does not state a general rule that jury trials are to be presumed whenever Congress provides for cases to be brought in the district court. To the contrary, Rule 38(a) renders it necessary to look elsewhere for a specific, affirmative grant of the right where, as here, the Seventh Amendment does not apply.

In attaching significance to the jurisdictional grant, the court of appeals (and the authorities it cited) placed substantial reliance on *United States* v. *Pfitsch*, 256 U.S. 547 (1921). There, Congress had conferred jurisdiction on the district courts to hear suits under Section 10 of the Lever Act (ch. 53, 40

---

jurisdiction in federal sector cases because it had done so in private sector cases, no inference whatever could be drawn respecting the right to trial by jury in federal sector cases.

[26] Distributing these cases among the district courts also avoids the substantial increase in the docket of the Court of Claims that would result if all federal sector ADEA cases were concentrated there. It provides a more convenient forum for plaintiffs as well.

Stat. 279), without limitation of the amount in controversy, to recover just compensation for certain war supplies requisitioned by the federal government. The question presented was whether the grant of jurisdiction was to be exercised in accordance with the Tucker Act (thus removing for this category of cases the limitation of district court jurisdiction under the Tucker Act to claims involving less than $10,000) or whether the grant of jurisdiction more resembled the ordinary jurisdiction of the district courts. The issue was raised because it affected the manner of appellate review (256 U.S. at 549), but the Court observed that its decision would also incidentally affect the right to a jury trial (*id.* at 550). The Court noted that Congress had considered and rejected a proposal to provide that claims under Section 10 of the Lever Act be brought pursuant to the Tucker Act, with its express preclusion of jury trials (*id.* at 550-551). Thus, in the Court's view, Congress had the question of jurisdiction "presented to its attention in a most precise form," and the Court found it "difficult to conceive of any rational ground for rejecting the clear and explicit amendment [providing for Tucker Act jurisdiction] except to accord a trial by jury" (*id.* at 552).

The validity of the dictum in *Pfitsch* regarding the availability of jury trials may be questioned, even on the facts there involved.[27] But however that may be,

---

[27] One of the two lower court decisions relied upon by the Court for its observation that the case would be tried to a jury if district court jurisdiction was not under the Tucker Act was *Filbin Corp.* v. *United States*, 266 F. 911 (E.D.S.C. 1920). See 256 U.S. at 549. In *Filbin*, the Court analogized a requisition of property under Section 10 of the Lever Act to an exercise of the power of eminent domain or condem-

there is no indication in the present case, as there was in *Pfitsch*, that Congress ever considered either the possibility of conferring jurisdiction of cases against

---

nation and concluded that the Seventh Amendment itself guarantees a jury trial in an action under that section to recover just compensation. See also *Filbin Corp.* v. *United States*, 265 F. 354, 357-359 (E.D.S.C. 1920), citing *Beatty* v. *United States*, 203 F. 620 (4th Cir. 1913). The holdings in *Filbin* and *Beatty* were not followed by other courts, see 5 J. Moore, *Federal Practice* ¶ 38.32[1], at 254-260 (2d ed. 1980), and the suggestion that the Seventh Amendment guarantee applies in condemnation proceedings was rejected by this Court in *United States* v. *Reynolds*, 397 U.S. 14 (1970). The other case relied upon by the Court in *Pfitsch* (*United States* v. *McGrane*, 270 F. 761 (3d Cir. 1921)) contains little discussion of the jury trial question and also reflects some doubt about the constitutionality of depriving the plaintiff of trial by jury. 270 F. at 764.

Moreover, when *Pfitsch* was decided, Section 566 of the Revised Statutes (later codified at 28 U.S.C. (1925 ed.) 770) provided: "The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury." Because *Pfitsch* involved an action at law, the Court might have assumed, *sub silentio*, that the claim fell within the reach of the statutory jury trial guarantee in Rev. Stat. 566 unless it was exempted from that provision by the Tucker Act's express prohibition of trial by jury.

The validity of such a construction of Rev. Stat. 566 is now academic, however, because the Revision Act of 1948 repealed the pertinent portion of 28 U.S.C. (1940 ed.) 770. See ch. 646, Section 39, 62 Stat. 992. Compare *Pernell* v. *Southall Realty*, 416 U.S. 363, 365-366 (1974). As a result, there is no longer any generally applicable statutory right to jury trial in federal district court as there was when *Pfitsch* was decided, even assuming that the statutory right could have been held to attach in suits against the United States.

Respondent argues (Br. in Opp. 14-15) that the right to trial by jury nonetheless remains in effect under the federal

the federal government on the Court of Claims rather than the district courts or the wisdom of authorizing jury trials in such cases. Moreover, as we have already explained (see pages 30-31, *supra*), one can readily "conceive of [a] rational ground"—indeed, several grounds—for conferring jurisdiction on district courts in federal sector ADEA cases that have nothing to do with jury trials. We repeat only one of them here: Section 15(c) of the ADEA, unlike the statute in *Pfitsch*, authorizes equitable relief, which Congress may have thought would more appropriately be considered by the district courts.[28]

---

rules. This contention is in error. The original advisory committee note to Rule 38 states that the right to jury trial declared in 28 U.S.C. (1940 ed.) 770 and similar statutes was "unaffected by this rule." Rule 38 merely implements the substantive right to a jury trial declared elsewhere, as in that statute. *Morgantown* v. *Royal Ins. Co.*, 337 U.S. 254, 258 (1949); 28 U.S.C. 2072 (Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."). It is true that the Reviser's Note to 28 U.S.C. 1873 (which carried forward the second sentence of 28 U.S.C. (1940 ed.) 770) inexplicably states that the jury trial provision in the first sentence "was omitted as covered by Rule 38 of the Federal Rules of Civil Procedure". But as Professor Moore has observed: "This reason is inadequate, for Rule 38 contains no affirmative grant of jury trial, but merely preserves the right 'as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States'. Thus, insofar as [Section] 770 gave a statutory right, which is now repealed, *there is nothing to take its place.*" 5 J. Moore, *Federal Practice* ¶ 38.07[2], at 37 (2d ed. 1980) (footnotes omitted; emphasis added).

[28] The court of appeals also relied (Pet. App. 11a) on *Law* v. *United States*, 266 U.S. 494 (1925), in attaching significance to the grant of jurisdiction to district courts. But

2. *The Provision for Award of "Legal or Equitable" Relief*

The court of appeals also found support for its conclusion in the language of Section 15(c) providing that a person aggrieved may bring a civil action for such "legal or equitable relief as will effectuate the purposes" of the Act. See Pet. App. 11a. The majority noted (*ibid.*) that the Court in *Lorillard* had relied on the provision in Section 7(c) authorizing the award of "legal" relief to buttress its finding of a statutory jury trial right (434 U.S. at 583). On the assumption "that Congress meant to confer the same rights when it used the same term in authorizing suits against the Government" (Pet. App. 11a), the court of appeals inferred that Congress also intended jury trials to be available in federal section ADEA cases. This reasoning is flawed for a number of reasons.

As we have noted, *Lorillard* involved an action brought against a private employer under Section 7(c) of the ADEA. The plaintiff argued that the Seventh Amendment guarantees a right to trial by jury in a private action for lost wages under that section or, alternatively, that the ADEA itself provides such a right. The Court decided the case on statutory grounds, finding that " 'a construction of the statute is fairly possible by which the [constitutional] question may be avoided' " (434 U.S. at 577, quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)).

Law merely cites *Pfitsch*, adding nothing to the analysis (266 U.S. at 496). The discussion of the jury trial right in that case was dictum in any event because the district court had granted the government's motion to strike the jury trial demand, and this Court reversed for reinstatement of the district court's judgment against the government sitting without a jury.

The principal basis of the Court's decision in *Lorillard* was that, when Congress incorporated the FLSA enforcement scheme into Section 7 of the ADEA, it adopted the settled practice of making jury trials available in such cases. 434 U.S. at 580-583. That aspect of the holding in *Lorillard* has no application here, because Congress did not incorporate the FLSA enforcement scheme in Section 15 of the ADEA. See 29 U.S.C. (Supp. II) 633a(f). It instead followed the Title VII model. See pages 23-26, *supra*.[29] In construing the statute to avoid a constitutional question under the Seventh Amendment, the Court also found it significant that Section 7(b) of the Act authorizes a district court to grant " '*legal* or equitable relief' " and Section 7(c) authorizes employees to bring actions for " '*legal* or equitable relief' " (434 U.S. at 583; emphasis supplied by the Court). The Court viewed the word "legal" as a term of art in this context, because "[i]n cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to jury trials" (*ibid.*, citing *Curtis* v. *Loether*, *supra*, 415 U.S. at

---

[29] In any event, there would be no statutory right to jury trial under Section 15(c) even if that section were thought to be analogous to the FLSA. The lower court cases cited by the Court in *Lorillard* recognizing a right to jury trial in FLSA actions all appear to have rested on the Seventh Amendment, not the FLSA itself. See *Wirtz* v. *Jones*, 340 F.2d 901, 903-904 (5th Cir. 1965); *Lewis* v. *Times Publishing Co.*, 185 F.2d 457 (5th Cir. 1950); *Olearchick* v. *American Steel Foundries*, 73 F. Supp. 273, 277-279 (W.D. Pa. 1947). These cases therefore do not suggest that there is a statutory right to a jury trial against the federal government under the FLSA or, by analogy, under the ADEA. To the contrary, the absence of any established right to trial by jury in FLSA actions against the United States would dictate, under the reasoning of *Lorillard*, that trial by jury be similarly unavailable in ADEA actions against the United States.

195-196). Because the word carried an established implication with respect to the availability of jury trials under the Seventh Amendment, the Court could infer that "Congress knew the significance of the term 'legal,' and intended that there would be a jury trial on demand" in an action to enforce liability for lost wages deemed to be unpaid minimum wages or overtime compensation for purpose of the FLSA (434 U.S. at 583).

When a constitutional question is presented, as in *Lorillard*, it is appropriate to indulge the presumption that Congress would not intend a grudging availability of jury trials in the types of private causes of action to which the Seventh Amendment generally applies and, therefore, that Congress itself is fully prepared to receive into ADEA procedures applicable in such causes the right to trial by jury that is ordinarily thought to result from the availability of legal relief. But no similar considerations underlie this case.

Section 7(b) and (c) of the ADEA, involved in *Lorillard*, have no application to actions brought against the federal government. This case arises under Section 15(c), which, as shown above, was added in 1974 (and amended in 1978) to establish wholly separate substantive and procedural provisions governing age discrimination in federal employment. Moreover, there is no need here, as there was in *Lorillard*, to consider whether it is "fairly possible" to construe the pertinent civil action provision to confer a jury trial right in order to avoid a constitutional question, because the Seventh Amendment does not apply to suits against the federal government. The issue is whether Congress affirmatively authorized jury trials.

By the same token, the word "legal" cannot be deemed a term of art as respects the availability of

jury trials in cases involving the federal government. Congress—and the Seventh Amendment itself—have always treated the jury trial issue differently in the context of actions at law against the government. Congress therefore cannot be thought to have attached any particular significance to the term "legal" when it enacted a separate section of the ADEA dealing with federal employment, and it would be improper to infer an intent to confer a right to jury trial from the use of the word in Section 15(c).[30]

---

[30] Moreover, it is not clear that the Court actually held in *Lorillard* that Congress had affirmatively *granted* a statutory right to trial by jury in such actions that is wholly independent of the Seventh Amendment right. The decision can instead be read to hold that Congress had, in effect, deemed a suit brought under Section 7(c) to recover lost wages to be the type of action at law to which the Seventh Amendment guarantee attaches. The Court found that, by using the word "legal," Congress had accepted the ordinary consequences of that characterization for jury trial purposes; Congress could thereby be said to have *received* into ADEA procedures (not *granted*) the jury trial right that the Seventh Amendment guarantees in suits at common law. In doing so, Congress would have obviated the need for the Court to undertake its own determination of the constitutional significance of the relief Congress made available.

This reading of *Lorillard* is also suggested by the Court's principal ground for the decision—the incorporation in Section 7 of the FLSA enforcement scheme and procedures, under which a right to trial by jury had been recognized. Significantly, as noted above (see note 29, *supra*), the FLSA decisions cited by the Court in *Lorillard* all appear to have held that an action to recover unpaid minimum wages or overtime compensation is a suit at common law to which the Seventh Amendment guarantee attaches, not that Congress had affirmatively granted an independent statutory right to jury trial in FLSA cases. Accordingly, when Congress patterned Section 7 of the ADEA after the FLSA, it can be held to have acquiesced in these decisions interpreting

The court of appeals read too much into the use of the word "legal" for another reason as well. Under Section 15, age discrimination in federal employment, unlike that in the private sector covered by Section 7, may be remedied either through administrative action by the EEOC (Subsection (b)) or through a civil action in district court (Subsection (c)). Section 15(b), in language drawn directly from the parallel provision in Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(b)), authorizes the EEOC to enforce the substantive prohibition in Section 15(a) "through appropriate remedies, including reinstatement or hiring of employees *with or without backpay*, as will effectuate the policies" of Section 15 (emphasis added). The authority to award relief under this language clearly is equitable or discre-

---

the provision for the award of unpaid minimum wages and overtime compensation in such a way as to bring it within the scope of the Seventh Amendment guarantee, and, as a result, to have intended the provision for parallel relief under Section 7 of the ADEA to be interpreted in the same way. If so, the incorporation of FLSA procedures into Section 7 of the ADEA is merely an acquiescence in constitutional holdings, not an independent grant of a statutory right to trial by jury.

If the discussion in *Lorillard* regarding the availability of "legal" relief is read in this manner, it is even more clearly inapplicable here. Under this reading, Congress simply acknowledged that the Seventh Amendment applies of its own force in an action under Section 7(c). Because the Seventh Amendment has no application in an action against the federal government, the jury trial right afforded by that Amendment would not attach of its own force in an action against the federal government under Section 15(c), even assuming that Congress acknowledged that the "legal" relief available under Section 15(c) is of the type that would invoke the Seventh Amendment guarantee in a suit between private parties. But see pages 39-41, *infra*.

tionary in nature. See, *e.g.*, *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 415-422 (1975). In particular, the provision for reinstatement or hiring "with or without backpay" stands in sharp contrast to the provision in Section 7(b) that lost compensation is an "[a]mount owing[]" and is "deemed to be unpaid minimum wages or unpaid overtime compensation" to which an individual in the private sector has an absolute entitlement. *Lorillard* v. *Pons*, *supra*, 434 U.S. at 584. Indeed, it was the recovery of this absolute entitlement that was considered in *Lorillard* to be the "legal relief" authorized in Section 7(b) and (c). See 434 U.S. at 583 n.11. Plainly, an individual has no entitlement to "legal relief" in this sense at the administrative level under Section 15(b).

If Congress contemplated the relief available at the administrative level under Section 15(b) to be equitable in nature, it is reasonable to assume that such relief is essentially equitable in nature in judicial proceedings as well, notwithstanding the presence of the word "legal" in Section 15(c).[31] To interpret Section 15(c) as authorizing the award of broader and nondiscretionary relief that is not available under Section 15(b) would only encourage employees to bypass the administrative remedies Congress obviously intended to resolve many complaints. See *Brown* v. *GSA*, 425 U.S. 820, 833 (1976).

As is evident, neither the provision for cases under Section 15(c) to be brought in district court nor the use of the word "legal" in that section can be

---

[31] This conclusion is supported by the fact that Congress patterned the enforcement scheme of the federal sector ADEA provisions after Title VII, which grants courts jurisdiction to award equitable relief against employment discrimination. See page 25, *supra*.

thought to manifest a congressional intent that the plaintiff in an ADEA action against the federal government have a right to trial by jury. The court of appeals' reliance on these factors was especially inappropriate in view of Congress' failure expressly to provide for jury trials in Section 15(c) when it amended Section 7(c) in 1978 to provide for such trials in private sector cases, and in view of the other indications in the legislative history that Congress did not intend to confer a right of jury trial when it enacted a separate section governing age discrimination in the federal sector.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ROBERT E. KOPP
MICHAEL JAY SINGER
ROBERT A. REUTERSHAN
Attorneys

JANUARY 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 336701 248

No. 80-242

MAR 30 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN F. LEHMAN,
SECRETARY OF THE NAVY,

Petitioner,

v.

ALICE NAKSHIAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

PATRICIA J. BARRY
1066 National Press Building
Washington, D.C. 20045
(202) 347-6463

Attorney for Respondent

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-242

JOHN F. LEHMAN,
SECRETARY OF THE NAVY,

Petitioner,

v.

ALICE NAKSHIAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

Whether the parties in an action against the federal government under Section 15(c) of the Age Discrimination in Employment Act, 29 U.S.C. 633a(c), are entitled to trial by jury.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	(i)
TABLE OF AUTHORITIES	(v)
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT:	14
Trial By Jury Is Available To Parties In Suits Brought Against The Federal Government Under The Age Discrimination In Employment Act	14
I. There Is No Presumption Against Jury Trials in Suits Brought Against The Federal Government	14
A. Express Denial of Jury Trials . .	23
B. No Provision for Trial Procedure	25
1. The War Risk Insurance Acts of 1917 & 1918, the World War Veterans' Act of 1924, and the National Service Life Insurance Act of 1940 .	25
2. Section 10 of the Lever Act .	28
3. Tax Refund Suits, Sec.3226 Rev. Stat.	29
4. Contract Settlement Act of 1944	29

Page

5. Tort Action Against The Virgin Islands Govt 30

6. Actions Brought Under The Constitution Against Federal Officials in Individual Capacity 32

7. Tax Suits Brought In Tax Courts Without Payment Of Taxes 32

8. Land Claims in Guam 33

C. Express Grant of Jury Trial 34

D. Government as Plaintiff 35

II. The Right to Jury Trial Arises From The Language Of Section 15 Of The ADEA By Implication And Expressly From The Language Of Section 7(b) Of The Act 41

A. By Implication From the Language in Section 15(c) 41

1. Exclusive Jurisdiction In The District Courts 41

2. The Provision For Legal Relief In Section 15(c) 45

a. The Lorillard Decision . . 45

b. Other Case Law Precedent . 47

3. Remedies And Procedures In s ection 15 Of The ADEA 50

Page

B. By Express Grant of Jury Trial in Section 7(c)(2) Of The ADEA, 29 U.S.C. Sec.626(c)(2) 53

1. Inferring a Right to Jury Trial Or Applying the Provision of §626(c)(2) To Federal ADEA Suits Is Not Repugnant To The Purposes Of The ADEA. 53

2. Construing Section 15 With Other Sections of The ADEA In Pari Materia Justifies A Conclusion Of Right To Jury Trial Under Section 15 Of The ADEA 56

3. Neither Section 15 Nor Any Other Section Of The ADEA Restricts The Meaning of "Legal Relief" As Used In 29 U.S.C. §633a(c) 57

III. The Legislative History of The ADEA 64

A. ADEA, 1967 64

B. The Fair Labor Standards Amendments of 1974 65

C. The 1978 ADEA Amendments 67

IV. Federal ADEA Cases Comprise a Small Percentage Of Cases In Which The Government Is Involved And A Jury Demand Is Made 71

V. Conclusion 73

TABLE OF AUTHORITIES

Cases: Page

Aetna Insurance Co. v. Kennedy, 301 U.S. 389 (1937) 40

Bagur v. C.I.R., 603 F.2d 491 (5th Cir. 1979) 33

Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959) . . 40

Berry v. United States, 312 U.S. 450 43

Carlson v. Green, ___ U. S. ___, 100 S.Ct 1468 (1980). 32

Chisholm v. Georgia, 2 Wall 419 (1792) 15

Collins v. Govt of Virgin Islands, 366 F.2d 279 (3rd Cir. 1966); cert. denied, 386 U.S. 958 (1967) 8, 16, 23-24, 30, 32, 44, 49

Curtis v. Loether, 415 U. S. 189 (1974) 47

Diary Queen v. Wood, 369 U. S. 469 (1962) 40

Dean v. American Security Insurance Co., 559 F.2d 1036 (5th Cir. 1977) 38

Dimick v. Schiedt, 293 U. S. 474 40

Cases, continued — Page

Dorl v. C.I.R., 507 F.2d 406 (2nd Cir. 1974) 33

Filbin Corp. v. United States, 266 F. 911 (E.D.S.C. 1920). . 36, 37

Franquez v. United States, 604 F.2d 1239 (9th Cir. 1979) . . 33

Galloway v. United States, 319 U. S. 372 (1943). 16, 17, 18, 26, 27, 34, 43

Gilbert v. United States, 370 U. S. 650 (1962) 46

Hacker v. United States, 16 F.2d 702 (5th Cir. 1927) 27, 44

Halliday v. United States, 315 U. S. 94 43

Harris v. U. S. Department of Treasury, 489 F.Supp. 476 (N.D.Ill. 1980) 63

Hepner v. United States, 213 U. S. 103 (1909). 36

Holliday v. United States, 87 F. Supp. 367, 114 Ct Cl. 702 . . . . . 27, 43

Houston Coal Co. v. United States, 26 U. S. 361 (1922) 21

Kohl v. United States, 91 U. S. 367 (1875). 47

La Chapelle v. Owens-Illinois Inc., 513 F.2d 286 (5th Cir. 1975). . 60

Cases, continued — Page

Law v. United States, 266 U. S. 494 (1925) 3, 17, 25, 34, 43

Leimer v. Woods, 196 F.2d 282 (8th Cir. 1952) 36, 49

Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979). 39

Lorillard v. Pons, 434 U. S. 575 (1978) 9, 37, 39, 40, 45, 46 47, 40, 64, 65

McElrath v. United States, 102 U. S. 426 (1880) 15

Monolith Portland Midwest Co. v. Reconstruction Finance Corp., 240 F.2d 444 (9th Cir. 1957) . 29, 36, 37 40, 47

Montclair v. Ramsdell, 107 U. S. 147 (1883) 46

Moysey v. Andrus, 481 F.Supp. 850 (D.D.C. 1979). 60

Parsons v. Bedford, 3 Pet. 433 . . . 14

Pernell v. Southall Realty, 416 U. S. 363 (1974) 40, 47

Prouty v. United States, 94 F.Supp. 320 (D.N.H. 195) 18, 22, 28, 43

R.F.C. v. Lyon, 179 Wash. 673 38 P.2d 1029 (1934) 29, 30

Cases, continued — Page

Rogers v. Exxon Res. and Engr. Co., 550 F.2d 834 (3rd Cir. 1977) 38

Slatin v. Stanford Res. Institute, 590 F.2d 1292 (4th Cir. 1979) . . . 38

Smails v. O'Malley, 127 F.2d 410 (8th Cir. 1942) 19, 20

Standard Oil Co. v. United States, 221 U. S. 1 (1911) 46

United States v. Biggs, 46 F.Supp. 8 (E.D.Ill. 1942) 36

United States v. Lease, 346 F.2d 696 (2nd Cir. 1965) 19-20

United States v. McGovern, 299 F.2d 302 (9th Cir. 1924). 25

United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453 (7th Cir. 1980) 35, 42, 43, 47

United States v. Pfitsch, 256 U. S. 547 (1921) 3, 21, 30, 34, 42, 48, 49

United States v. Regan, 232 U. S. 37 (1914) 32

United States v. Reynolds, 397 U. S. 14 (1970) 37

United States v. Theimer, 199 F.2d 501 (10th Cir. 1952) . . . . . 36 , 37

Cases, continued — Page

United States v. Thomas, 53 F.2d 192 (4th Cir. 1931) 25

Wehr v. Burroughs Corp., 619 F.2d 276 (3rd Cir. 1980) 39

Whitney v. United States, 8 F.2d 476 (9th Cir. 1925) 27, 43

Wickwire v. Reinecke, 275 U. S. 101 (1927) 16, 18 19, 34, 48

Wilson v. United States, 530 F.2d 772 (8th Cir. 1976) 19, 48

Constitution, statutes, rules, and regulations:

United States Constitution, Seventh Amendment . . . . . passim

§3226, Rev. Stat. 19, 29, 47

28 U. S. C. §770 . . . . . 42, 43

28 U. S. C. §1873 43

28 U. S. C. §2402 . . . . 18, 19, 22, 23

28 U. S. C. §2409a 23, 24

28 U. S. C. §2409(e) 23

40 U. S. C. §257 36

42 U. S. C. §1424c 33

Constitution, statutes, rules and regulations, Continued

Page

Age Discrimination in Employment Act, 29 U. S. C. §621, et. seq. 1

Section 4 of the ADEA, 29 U. S. C. §623 62

Section 4(f)(2), 29 U. S. C. §623(f)(2) 11, 53, 56, 61

Section 7, 29 U. S. C. §626 . . passim

Section 7(b), 29 U. S. C. §626(b). 38, 39, 62

Section 7(c), 29 U. S. C. §626(c) 45, 52, 61

Section 7(c)(1), 29 U. S. C. §626(c)(1) 57, 58

Section 7(c)(2), 29 U. S. C. §626(c)(2) 11, 60

Section 7(d), 29 U. S. C. §626(d) 52

Section 11(f), 29 U. S. C. §630(f) 11, 61

Section 12(a), 29 U. S. C. §631(a) 11, 58, 61

Section 12(b), 29 U. S. C. §631(b) 58

Section 12(c), 29 U. S. C. §631(c) 11, 58, 61

Section 12(d), 29 U. S. C. §631(d) 11, 58, 61

Constitution, statutes, rules and regulation - continued

Page

Section 15, 29 U. S. C. §633a . . . . . passim

Section 15(a), 29 U. S. C. §633a(a) 11, 58

Section 15(b), 29 U. S. C. §633a(b) 51

Section 15(c), 29 U. S. C. §633a(c) 50, 57, 59, 62

Section 15(d), 29 U. S. C. §633a(d) 52

Section 15(f), 29 U. S. C. §633a(f) . . 11, 12, 57, 58, 59, 63

29 U. S. C. §621 53

Alien Immigration and Naturalization Act, Sections 4 and 5 36

Contract Settlement Act of 1944, C.358, §1, 58 Stat. 649 . . . . . 25, 48

Emergency Price Control Act of 1942, C.26, §205(e), 56 Stat. 23 . . . 36

Fair Labor Standards Act of 1938, 29 U. S. C. §201, et seq. 53

Section 3(d), 29 U. S. C.. §203(d) 54

Section 3(e)(2), 29 U. S. C. §203(e)(2) 54

Constitution, statutes, rules and regulations - Continued

Page

Section 11(b), 29 U. S. C. §211(b) 61 65

Section 16, 29 U. S. C. §216 . . . . . 60 65

Section 16(b), 29 U. S. C. §216(b) 54 61

Section 17, 29 U. S. C. §217 . . 65

Fair Labor Standards Amendments of 1974, Pub.L. No.93-259, 88 Stat. 55 et seq. 54

Federal Tort Claims Act, 28 U. S. C. §1346(b) 23, 31

Federal Tort Claims Procedure, 28 U. S. C. §§2671-2680 23

Judiciary Act of 1789, Sections 9 and 12 . . . . . 42, 43

Lever Act, Section 10, Aug. 10, 1917, (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §3115-1/8ii) 21, 22, 28, 42

Miller Act, 40 U. S. C. §270a(a). . . 35

National Service Life Insurance Act of 1940, §601, et seq., as amended, 28 U.S.C.A. §801, et seq. 22

Revision Act of 1948, Ch.646, §39, 62 Stat. 992 42

Constitution, Statutes, rules and regulations - continued

Page

Title VII, 1964 Civil Rights Act, 42 U. S. C. §2000e, et seq. . . 9, 50, 51

§706(g), 42 U.S.C. §2000e-5(g) 51

§717(b), 42 U.S.C. §2000e-16(b) 51

§717(c), 42 U.S.C. §2000e-16(c) 51

§717(d), 42 U.S.C. §2000e-16(d) 51

Tucker Act, 28 U. S. C. §1346 . .18, 19, 20 22, 23

Section 2 26

Section 5 26

Section 6 26

Section 10 26

1925 Amendment to Tucker Act, 43 Stat. 1302 18

1954 Amendment to Tucker Act, Act of July 30, 1954, Ch. 648, §2(a), 68 Stat. 589 . . . . . 19, 26

28 U.S.C. §1346(f) 24

Virgin Islands, Act 921, §2 . . . 30

War Risk Insurance Acts of 1917, §400 40 Stat. 409; 1918, §13, 40 Stat. 555 . . . . . .17, 21, 22 25, 26, 30

Constitution, statutes, rules, and regulations - continued.

Page

World War Veterans' Act of 1924, §§1-19, as amended, 38 U. S. C. §§421-445 . . . . . 22, 23, 24 26, 27

Rule 38(a), Fed. Rules Civ. Proc. . . . 43

Rule 71A(h) & (k), Fed. Rules Civ. Proc. 37

29 C.F.R. §1613 51

Legislative History

H.R.No.1518, 68th Cong.,2d Sess. . 18, 27

H.R.No.659, 83d Cong., 1st Sess., 3 (1953) 20

H.R.No.805, U. S. Code Congressional and Admin. News, 90th Cong., 1st Sess (1967). 61

124 Cong. Rec. H2000 (daily ed., March 14, 1978) 38, 39, 69

123 Cong. Rec. S17297 (daily ed., Oct. 19, 1977) 64

125 Cong. Rec. E4258 (daily ed. Sept. 9, 1979) 70

S.R.No.93-690, 93d Cong.,2d Sess. (1974) 66

Legislative History, Continued

Page

S.R.No. 95-493, 95th Cong. 2d Sess. (1978) 68

Miscellaneous

Brief of Amicus Curiae, American Federation of Government Employees, in Lehman v. Nakshian, No.80-242 55

Brief of Amici Curiae, Members of Congress in Lehman v. Nakshian, No.80-242 54

2A Sands Sutherland Statutory Construction (4th Ed. 1973) . . . .

Historical & Revision Notes, 28 U. S. C. A. §1873, p.317 43

Memorandum for U. S. Attorneys and Agency General Counsel from Attorney General Bell, August 31, 1977 . . . 60

INTRODUCTION

Citations to the opinions and judgments delivered in the courts below and a statement of jurisdiction of this court are found at page 1 of the petitioner's brief (hereinafter "P. Brief").

STATEMENT

Petitioner failed to set out the reasoning of the Court of Appeals in rejecting the government's position that the doctrine of sovereign immunity embraces immunity from jury trial.

The Court recognized that the government cannot be sued without its consent; can specify the procedures, including whether the case is to be tried to a jury or to the court; but that in the instance of a statute which does not explicitly state what kind of trial procedure shall be used, there is no automatic presumption against jury trials,

Petitioner's Appendix ("Pet. App."), 10a.

The Court went on to state that courts have inferred congressional intention allowing jury trials in actions against the government without explicit statutory grants, relying on United States v. Pfitsch, 256 U.S. 547 (1921), and Law v. United States, 266 U.S. 494 (1925).

The Court also stated that the government's argument that there is a presumption against jury trials in actions against the government appears to be connected with the misunderstanding of the doctrine of sovereign immunity. The Court stated that since sovereign immunity bars all actions against the government, ". . . it is difficult to see why this doctrine should create a presumption against any particular method of trial.

Indeed, if there are to be any presumptions, it would seem that the preference for jury trials in our jurisprudence would support a presumption in favor of such trials." Pet. App., 9a.

SUMMARY OF ARGUMENT

I

There is no constitutionally-based right to jury trial in suits against the federal government because suits against the sovereign were unknown at the common law. Further, the government can declare in what court it may be sued and prescribe the forms of pleading and rules of practice, including trial practice.

On the other hand, there is no general presumption against jury trials in suits in which the government is sued and the statute is silent concerning trial procedure. Immunity having been waived,

the sovereign immunity doctrine "drops out of the picture," to use the words of the Court of Appeals below, and the determination of whether jury trial is permissible is determined by well-established principles of statutory construction.

The decision of the Court of Appeals below is well within the case law tradition of unbroken precedent in which the courts, including this Court, have been asked to determine whether a right to jury trial arises by implication from the statute allowing suit against the government. The decisions have, without exception, affirmed a right to jury trial.

Congress has expressly denied jury trial in suits against the government in at least three instances, one denial of which only lasted a year; expressly allowed them in at least two instances;

and remained silent on the matter in many others.

Of note are cases in which the government is the plaintiff, inasmuch as the analysis in arriving at an inference of jury trial when the statute is silent about trial procedure is the same as in the instances when the government is the defendant. In these instances, the courts found a right to jury trial.

The "deep pocket" theory the Petitioner poses does not apply to federal ADEA cases, since juries are restricted to awards of "amounts owing" (generally, backpay) and liquidated damages (only in cases of willful violation of the ADEA) equal to the amount of "pecuniary loss." The trend of the case law is not to permit compensatory or punitive damages.

In summary, courts have unhesitatingly found a right to jury trial as much

in cases in which the government is sued as they have in cases involving nongovernmental parties, because of the recognition that the jury trial is the basis of the American legal system.

The manner in which the Court of Appeals below arrived at its decision affirming Ms. Nakshian's right to jury trial is not without precedent.

An examination of the case law in this area proves that the two criteria found in the language of Section 15 of the Act on which the Court of Appeals relied to conclude a right to jury trial in federal ADEA cases are the two classical determinants traditionally used by courts when ascertaining whether jury trial can be implied from statutory language.

Those two determinants are exclusive jurisdiction in district courts and a

characterization of the action or remedy as legal. The Court of Appeals' decision, based on these two factors, is part of an unbroken chain of precedent, the most interesting of which is Collins v. Govt. of Virgin Islands, 366 F.2d 279 (3rd Cir. 1966), cert. denied, 386 U.S. 958 (1967). In that case, the government sought a jury trial in a tort action in which it was sued; was denied it; and appealed from the denial. The Third Circuit found in the government's favor for the same reasons the Court of Appeals below found in Ms. Nakshian's favor, namely, exclusive jurisdiction in the district court and the characterization of the action as one at law.

This Court found determinative of the right to jury trial in ADEA cases the language in 29 U.S.C. §626(c)(1) characterizing relief available in courts as

both legal or equitable, Lorillard v. Pons, 434 U.S. 575 (1978). This reasoning is clearly appropriate when, as here, the relief available under another section of the ADEA is also described as "legal."

Petitioner argues that the enforcement scheme in Section 15 of the ADEA is modeled after Title VII, therefore implying a denial of jury trial. However, the remedies and procedures of Section 15 which this Court said in Lorillard must be looked to when determining whether jury trial is implied, depart dramatically from the Title VII scheme. First, there is no requirement of exhaustion of administrative remedy under Section 15 as there is in Title VII, and second, one is entitled to both legal and equitable relief under Section 15, whereas, only equitable relief is possible under Title VII.

Applying the provisions of Section 626(c)(2), the jury trial amendment, to Section 15 of the ADEA is not repugnant to the purposes of the act or of its amendments in 1974 and 1978. In none of the articulated purposes, in particular, those of the 1978 amendments, is there anything to suggest a restriction on the liability of the federal government. In particular, federal employees were afforded greater benefits under the 1978 amendments than what was afforded to non-federal employees, since the upper age ceiling was abandoned completedly for individuals covered by Section 15 of the act, but only expanded by five years, to age 70 for nonfederal employees. Construing the ADEA in pari materia with the FLSA as well as construing the sections in pari materia with other sections of the ADEA warrants a right to jury trial in suits under Section 15 of the ADEA.

While the petitioner argues that Section 15(f) of the ADEA, added to Section 15 in 1978, prohibits the application to Section 15 of any provision of the ADEA, other than the provisions of Section 15, he can point to no legislative history that supports such a theory.

Rather, from the limited legislative history on the subject, the purpose of the amendment is to protect the individuals protected under the provisions of Section 15 from the employer defenses in Section 4(f)(2), from the exceptions to ADEA coverage in Section 11(f), and from the restrictions or qualifications in Sections 12(a), (c) and (d).

Section 15(f) became effective the same time as the amendments to Sections 15(a) and 12(a), six months beyond the date of the enactment of the amendments; whereas, the jury trial amendment, Section

7(c)(2), became effective on the date of enactment of the amendments.

It is noted that the petitioner never raised this argument in the courts below, thus affording no opportunity for the courts to rule on the argument before this Court passes on its merits. Even if Section 15(f) prohibits the application of the jury trial provision to Section 15 ADEA suits, legal relief is still available in such suits by the provisions of Section 15.

The legislative history of the act and of the amendments betray no sentiment on the part of Congress to limit or restrict the rights, remedies and procedures available to persons aggrieved by nonfederal employers when applied to the federal sector.

Finally, it cannot be gainsaid that federal ADEA litigation comprises a small percentage of government litigation in

which jury demands are made, making up only 9.5% of such litigation. This percentage amounts to only eighteen demands in a 25-month period in the District of Columbia where the greatest amount of government litigation occurs. The jury demands resulting from federal ADEA litigation are only two percent higher than the number of jury demands made by the government itself.

ARGUMENT

TRIAL BY JURY IS AVAILABLE TO PARTIES IN SUITS BROUGHT AGAINST THE FEDERAL GOVERNMENT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

I. There Is No Presumption Against Jury Trials In Suits Brought Against the Federal Government.

A constitutionally-based right to jury trials in suits at common law[1] does not extend to civil suits against the federal government because suits against

1. The term "common law" is used throughout this brief in two ways, based on the context in which the phrase is found. Common law refers to the body of judge-made law in England that was passed on by the framers of the Constitution and filtered through and transformed in to the American experience of jurisprudence. In this sense, the term "common law" refers to that system of law of England in which distinctions sometimes sharply drawn and sometimes meaningless are made among the legal writs sought in the common law courts, equitable remedies sought in the courts of the Chancellor and cases arising in admiralty and under maritime jurisdiction. However, "common law" is also used in a more narrow sense, to distinguish the legal writ or remedy sought in the common law courts of the king as opposed to an equitable remedy sought in the courts of equity, i.e., the courts of the Bishop or Chancellor. See J. Storey's definitions of the term in Parsons v. Bedford, 3 Pet. 433, 446-447.

the sovereign were unknown to the common law.[2]

Certainly, also, the government ". . . can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States." McElrath v. United States, 102 U.S. 426, 440 (1880).

---

2. But see, Chisholm v. Georgia, 2 Wall 419, 459-60 (1792), in which Justice Wilson stated:

> ". . . the king's court should be open to all plaintiffs by which, without delay, they should have remedial writs, as well as against the king or against the queen, as against any other of the people. (d). . . . True, it is that now, in England, the king must be sued in his courts by petition; but even now the difference is only in the form, not in the thing. The judgments or decrees of those courts, will substantially be the same upon a precatory as a mandatory process." (Emphasis added).

However, the analysis does not stop there in cases in which suit is brought against the government involving statutes which are silent concerning the mode of trial procedure. As the Third Circuit reasoned in Collins v. Govt. of Virgin Islands, 366 F.2d 279, 282 (3rd Cir. 1966), cert. denied, 386 U.S. 958 (1967):

> "The question as to whether Government having waived this immunity is entitled to a jury trial is free of the impact of the Seventh Amendment to the Constitution since it is clear that a suit against the sovereign was not a suit at common law within the meaning of the Seventh Amendment. Rather, the answer must be sought in well-established principles relating to the waiver of immunity by the sovereign."

In Galloway v. United States, 319 U.S. 372 (1943), and in Wickwire v. Reinecke, 275 U.S. 101, 105 (1927), this Court noted that the Seventh Amendment did not apply to the cases because of the common law proscription on suits

against the sovereign but, nonetheless, recognized the right to jury trial in both instances.

In Galloway, this Court stated:

> "The suit is one to enforce a monetary claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign. Whatever force the Amendment has therefore is derived because Congress, in the legislation cited, has made it applicable." 319 U.S. at 388.

Galloway was a suit involving the War Risk Insurance Acts of 1917, §400, 40 Stat. 409; 1918, §13, 40 Stat. 555.

Prior to Galloway, this Court had already determined that the War Risk Insurance Act was construed to mean that the "usual procedure . . . in actions at law for money compensation" applied, and therefore, right to jury trial was implied from the statute. Law v. U.S., supra.

Later, Congress amended the Act, changing the procedure to that used under the Tucker Act, which expressly disallows jury trials. See 43 Stat. 607, 613; 24 Stat. 505. A year later in 1925, Congress had a change of heart and statutorily reinstated the right to a jury trial. 43 Stat. 1302; H.R. No. 1518, 68th Cong., 2d Sess. 2, as cited in Galloway v. U.S., 319 U.S. at 318, ftn. 18. See also, Prouty v. United States, 94 F. Supp. 320, 321 (D.N.H. 1950).

In Wickwire, this Court noted the government had abandoned in its brief on the merits an argument raised in its opposition to the petition for writ of certiorari, that the petitioner's assignment of error was inadequate because it was not based on the Seventh Amendment. This Court assumed the objection was not renewed, ". . . doubtless because the right of the petitioner for a jury in

such a case is not to be found in the Seventh Amendment to the Constitution but merely arises by implication from the provisions of §3226, Revised Statutes, which has reference to a suit at law." 275 U.S., at 105-106.

See Wilson v. United States, 530 F. 2d 772, 780, ftn. 4 (8th Cir. 1976) (concurring opin., J. Lay): "The right to a jury trial on factual questions in refund suits was originally recognized by implication from a statutory reference to suits at law. [Wickwire v. Reinecke, 275 U.S. 101, 105-06 . . . (1927)]. Today, the statutory grant is explicit in tax refund cases under 28 U.S.C. §2402, enacted in 1954 as an amendment to the Tucker Act, 28 U.S.C. §1346, Act of July, 30, 1954, Ch. 648, §2(a), 68 Stat. 589." See also, Smails v. O'Malley, 127 F.2d 410 (8th Cir. 1942), and United States v. Lease, 346 F.2d 696 (2nd Cir. 1965),

both holding right to jury trial in district court in tax refund suit.

Petitioner noted when Congress amended the Tucker Act in 1954, to allow jury trials in tax refund cases, one of the House reports stated that the "legislation did establish a 'wholly new precedent' because 'for the first time jury trials would be permitted in suits against the Government.' H.R. No. 659, 83d Cong., 1st Sess. 3 (1953)." P. Brief, 12-13.

Obviously, the statement is factually impossible on its face, since the Amendment itself was merely a codification of the right to jury trial already established as a matter of case law, including by this Court.

Further, as we have already demonstrated and shall now demonstrate, by 1954 the government had also been sued under other statutes which this Court

had determined by implication made available jury trial to the parties if so desired.

The War Risk Insurance Act cases are one kind, while the tax refund suits in district court are another. However, in a seminal case, U.S. v. Pfitsch, supra, this Court had determined by implication from the statute that parties were entitled to jury trial in suits brought against the federal government under Section 10 of the Lever Act, Aug. 10, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §3115-1/8ii).[3]

3. In a subsequent case brought under §10 of the Lever Act, the government argued the following: "It would seem to be clear that, from the language of §10 of the Lever Act, the only issue which Congress contemplated would arise under the Act was that of just compensation, and it was willing, indeed, it insisted, that the property owner have the right of trial by jury as to that issue. United States v. Pfitsch, 256 U.S. 547." Houston Coal Co. v. United States, 26 U.S. 361, 363 (1922). A rather ironic statement in view of the petitioner's arguments in the instant case that silence, at least in one section of a statute, namely, Section 15 of the ADEA, regarding

(Continued)

In Prouty v. U.S., supra, the court concluded that jury trial was available in addition to the War Risk Insurance Act of 1917 and the World War Veterans Act of 1924, under the National Service Life Insurance Act of 1940. Thus, in 1954, jury trial was available in suits against the government under at least four statutes.

Before proceeding further, it is necessary to delineate what Congress generally has done concerning mode of trial procedure in suits involving statutes in which the government is a defendant.

(Footnote 3 continued)

trial procedure is construed as denial of jury trial; whereas, such silence in a section of another statute, Section 10 of the Lever Act, is construed as an insistence on a right to jury trial.

A. Express Denial of Jury Trials

In at least three instances, Congress has explicitly denied trial by jury in suits brought under the Tucker Act, except tax refund suits, 28 U.S.C. §1346; 28 U.S.C. §2402; and in any suit brought against the government to quiet title to real estate, 28 U.S.C. §2409a; 28 U.S.C. §2409a(e); and for one year in suits brought under the World War Veterans' Act of 1924. See pp. 13, 14 and 22 of this brief.

The first general denial of jury trial applies to suits brought under the Federal Tort Claims Act, 28 U.S.C. §§2671-2680; 28 U.S.C. §1346(b). Obviously, Congress had good reason for placing an express denial of jury trial in the statute if Congress wanted only court trials in such actions, since "[i]n such an action it is hornbook law that the parties are entitled to a trial

by jury." Collins v. Govt. of Virgin Islands, 366 F.2d 279, 283 (3rd Cir. 1966), cert. denied, 386 U.S. 958 (1967).

The same rationale applies to actions to quiet title to real estate brought under 28 U.S.C. §2409a, inasmuch as although actions to quiet title to real estate might be considered actions in equity, Congress nonetheless had vested exclusive jurisdiction over such suits in district court, 28 U.S.C. §1346(f). Thus, by the action Congress took in March 1924 and then in 1925, amending the World War Veterans' Act, it established it was aware of the significance which placing exclusive jurisdiction in the district court over actions took on with respect to the matter of trial procedure -- and wanted to avoid the obvious result of trial by jury by expressly denying it.

As the ensuing analysis demonstrates, such a belief on the part of Congress is correct, for in every instance save one, in which statutes allowing suits against the government are silent concerning the mode of trial procedure, courts have construed by implication from the statute a right to jury trial.

B. No Provision for Trial Procedure

1. The War Risk Insurance Acts of 1917 and 1918, the World War Veterans' Act of 1924, and the National Service Life Insurance Act of 1940.

As already indicated in this section, this Court implied a right to jury trial under the War Risk Insurance Act of 1917, §400, 40 Stat. 398, in Law v. U.S., 266 U.S. at 496. See also, United States v. McGovern, 299 F.2d 302 (9th Cir. 1924); United States v. Thomas, 53 F.2d 192, 195 (4th Cir. 1931).

In Galloway, supra, the suit was also brought under the War Risk Insurance Acts of 1917 and 1918, and a jury heard the case, although the government was granted its motion for a directed verdict. See pp. 12-14 of this brief.

In 1924, the World War Veterans' Act superseded the War Risk Insurance Acts and Congress expressly provided in the act that the procedure for suits brought under the statute would be the procedure for suits brought under the Tucker Act. Within a year, Congress, at least as interpreted by subsequent courts ruling on the issue, had a change of heart and amended the portion of the act concerning jurisdiction and procedure, so that, in effect, Sections 5, 6 and 10 of the Tucker Act applied to suits brought under the statute, but not Section 2 of the Tucker Act, which precluded jury trials.

"The conclusion is irresistible, however, that by omitting Section 2 of said Act, Congress intended to give litigants the right of trial by jury as in ordinary cases." Hacker v. United States, 16 F.2d 702, 704 (5th Cir. 1927), H.R. No. 1518, 68th Cong., 2d Sess. 2, states that the amendment to the act was done with the intention to "'give the claimant the right to a jury trial.'" Galloway v. U.S., 319 U.S. at 389, ftn. 18.

Suitors in cases brought under the World War Veterans' Act of 1924 therefore are entitled to jury trials if so desired. Whitney v. United States, 8 F.2d 476 (9th Cir. 1925); Hacker v. U.S., supra; Holliday v. United States, 87 F. Supp. 367, 368, 114 Ct. Cl. 702, in which the Court of Claims held it did not have jurisdiction to hear suits under the World War Veterans' Act of 1924.

In Prouty v. U.S., supra, the court held a right to jury trial under the War Risk Insurance Acts of 1917 and 1918, under the World War Veterans' Act of 1924, and under the National Service Life Insurance Act as well, since the amended procedure applicable to the Veterans Act the court found ". . . obtained to the enactment of the National Service Life Insurance Act of 1940, 38 U.S.C. §§801, 817, 54 Stat. 1008-1014, wherein it was adopted and continued."

2. Section 10 of the Lever Act

As we have already indicated, this Court found an implied right to jury trial in suits arising under Section 10 of the Lever Act, although this section, like the acts described in subsection 1 above, is silent with respect to the mode of trial procedure.

3. Tax Refund Suits, Section 3226, Revised Statutes.

As we have already indicated, this Court also found an implied right to jury trial in suits brought under §3226, Revised Statutes, although once more the statute is silent respecting mode of trial procedure.

4. Contract Settlement Act of 1944

In Monolith Portland Midwest Co. v. Reconstruction Finance Corp., 240 F.2d 444, 446 (9th Cir. 1957), the Ninth Circuit found an implied right to jury trial when the Reconstruction Finance Corporation, a wholly-owned government corporation, is sued under the Contract Settlement Act of 1944, 41 U.S.C. §§101, et seq.; July 1, 1944, C. 358, §1, 58 Stat. 649, although the statute says nothing about the mode of trial procedure. See also, R.F.C. v. Lyon, 179 Wash. 673, 38

P.2d 1029 (1934). The Ninth Circuit relied on U.S. v. Pfitsch, supra, in so ruling.

5. Tort Action Against Virgin Island Government.

A case of surprising twist and of relevance to this case is Collins v. Govt. of Virgin Islands, supra. The case involved an act of the Virgin Islands, Act 921, §2, waiving immunity of the government and making it subject to suit in tort actions "'as in the case of any other defendant, subject to the same procedures and defenses . . .'" (emphasis is supplied by opinion writer). 366 F.2d at 283.

This case is significant for three reasons:

(1) The government wanted the jury trial, not the plaintiff, was denied it, and appealed from the denial.

(2) Act 921 is identical in its waiver language to that of the Federal Tort Claims Act (28 U.S.C. §1346(b)), but unlike the Federal Tort Claims Act, is silent with respect to the mode of trial procedure, thus buttressing our thesis discussed at p. 19 of this brief, that if Congress had not expressly disallowed a jury trial in Federal Tort Claims Act cases, a right to jury trial would have been implied, as it was in the Collins case.

(3) The reasoning the Third Circuit followed in reaching its conclusion that the government is entitled to a jury trial in the tort action is identical to that followed by the District of Columbia Circuit in reaching its conclusion that Ms. Nakshian is entitled to a jury trial. It found that the Seventh Amendment did not apply; that the government can dictate the terms and conditions under which

it may be sued; that the grant of jurisdiction is an aid in determining the method trial in the absence of an expressed provision; and that in addition to "hornbook law" entitlement to jury trial in tort actions, the action is one at law. Id., at 283.

6. Actions Brought Under the Constitution Against Federal Officials in Individual Capacity.

This Court has stated in dictum that individuals bringing suits against federal officials for damages in a Bivens action are entitled to jury trials. Carlson v. Green, ___ U.S. ___, 100 S. Ct. 1468 (1980).

7. Tax Suits Brought in Tax Courts Without Payment of the Taxes.

In this instance, in which the courts were asked to construe a statute silent with respect to trial procedure, is the right to jury trial denied. Bagur v.

C.I.R., 603 F.2d 491, 500 (5th Cir. 1979); Dorl v. C.I.R., 507 F.2d 406 (2nd Cir. 1974). However, as will be analyzed more fully, infra, this conclusion of no right to jury trial in tax court is consistent with the line of cases discussed in this section, inasmuch as a critical index necessary to establish jury trial by statutory implication is lacking, namely, exclusive jurisdiction in the district courts, found, however, in tax refund suits.

8. Land Claims in Guam

Franquez v. United States, 604 F.2d 1239 (9th Cir. 1979), a case cited by our amicus, American Federation of Government Employees ("AFGE"), is one arising under 42 U.S.C. §1424c and dealing with the review of claims concerning land acquired by the United States government on Guam.

The statute is silent concerning trial procedure, and jury trial was demanded. The government argued that an

express grant of jury trial was required. The court rejected the argument and found right to jury trial by implication.

Thus, the Court of Appeals' decision affirming a right to jury trial in the absence of an express grant in the statute allowing suit against the government is in conformity with a well-developed body of case law in this area stemming from this Court's guidance in Pfitsch, Law, Galloway and Wickwire.

C. Express Grant of Jury Trial

As already set out in this brief at pp. 21-25, Congress has expressly allowed jury trials in tax refund cases and, perhaps, in World War Veterans' Act cases, depending on what is considered to mean express grant of jury trial. Both statutory grants were an affirmance of the case law allowing jury trials.

D. Government As Plaintiff

Although cases in which the government is suing are distinguished from cases in which the government is sued, the analysis concerning the right to jury trial when the statute says nothing about trial procedure is the same as in the cases in which the government is the defendant.

In the cases which this author found involving the government as a plaintiff proceeding under statutes silent about trial procedure, the courts found a right to jury trial:

1. **Forfeiture of Automobile:** United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453 (7th Cir. 1980);

2. **Government Seeking to Indemnify Subcontractors Working for Government Contractors:** Miller Act, 40 U.S.C. §270a(a);

United States v. Biggs, 46 F. Supp. 8, 11 (E.D. Ill. 1942);[4]

3. Government Seeking Treble Damages from Landlord Who Overcharges On Rents: Emergency Price Control Act of 1942, Chap. 26, §205(e), 56 Stat. 23; Leimer v. Woods, 196 F.2d 828 (8th Cir. 1952);

4. Government Seeking Civil Penalties Under §§4 and 5 of the Alien Immigration Act: Hepner v. United States, 213 U.S. 103 (1909); United States v. Regan, 232 U.S. 37, 47 (1914);

5. Condemnation Proceedings: United States v. Theimer, 199 F.2d 501, 503 (10th Cir. 1952); Monolith, supra, at 447.[5]

---

4. In Part IV of this brief, a summary is set out of research of cover sheets (Form JS-44c) filed with complaints in the District Court for the District of Columbia to determine the number of jury demands made in which the Government is a party. The research revealed that the Government routinely demands a jury trial under the Miller Act and under the condemnation statute, 40 U.S.C. §257.

5. Petitioner challenges the vitality of Pfitsch, arguing that this Court's reliance on Filbin Corp. v. United States, 266 F. 911 (E.D.

(Continued)

See Rules 71A(h) and (k), providing for jury trial in condemnation proceedings. Petitioner poses the specter of overly generous juries, in view of the government's "deep pocket."[6] However, the deep pocket theory has no applicability to the instant

---

(Footnote 5 continued)

S.C. 1920), is no longer valid for the reason that this Court rejected the notion that the Seventh Amendment guarantee does not apply in condemnation proceedings, in United States v. Reynolds, 397 U.S. 14 (1970). However, such a view is purely academic, since ". . . while a jury trial is not required in condemnation suits as a constitutional matter, in practice juries have often been used in such actions. Monolith, supra, at 447.

Furthermore, in Monolith, the court cites United States v. Theimer, 199 F.2d 501, 503 (10th Cir. 1952), in which the court discusses the evolution of Rule 71A, Federal Rules of Civil Procedure, applying to federal condemnation cases. The Theimer court found that "' [p]rolonged study had been given to the subject of condemnation cases by the Advisory Committee of the Supreme Court. . . . "We therefore conclude that the parties to a condemnation proceeding are ordinarily entitled to a jury under Rule 71A(h) as a matter of right. . . ."'" Ibid.

6. In spite of this, in Lorillard v. Pons, 434 U.S. 575 (1978), this Court unhesitatingly extended the right of jury trial to other public employment where the deep pocket theory has as much applicability as it does to public employment involving the federal government.

case for the same reason Congress determined that a jury in tax refund cases supposedly would not wreak havoc with the United States Treasury. Just as juries, sitting in tax refund cases, are limited to the amounts of overpaid taxes, so juries sitting in federal ADEA cases are restricted to "amounts owing," defined as "unpaid minimum wages and overtime compensation." See 29 U.S.C. §626(b).

The trend of the case law is not to permit compensatory and punitive damages.[7]

---

7. Dean v. American Security Insurance Co., 559 F.2d 1036 (5th Cir. 1977); Rogers v. Exxon Res. and Engr. Co., 550 F.2d 834 (3rd Cir. 1977); Slatin v. Stanford Research Institute, 590 F.2d 1292 (4th Cir. 1979). This trend is supported by the legislative history surrounding the 1978 ADEA Amendments:

> "The House recedes with an amendment which provides for a jury trial on any issue of fact in an action for recovery of a violation of the ADEA. Under Section 7(b), which incorporates the remedial scheme of sections 11(b), 16 and 17 of the FLSA, 'amounts owing' contemplates two elements: First, it includes items of pecuniary or economic loss such as

(Continued)

Thus, the only damages that can be awarded are liquidated damages, but only if willful violation of the law is proven,[8] and the measure of the liquidated damages, according to Congress, is the "pecuniary loss." See ftn. 7.

In conclusion, courts have unhesitatingly found a right to jury trial in cases in which the government is sued and the statute is silent concerning trial procedure, as they have in cases involving nongovernment parties.

(Footnote 7 continued)

> wages, fringe, and other job related benefits. Second, it includes liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA. 124 Cong. Rec. H-2000 (daily ed., March 23, 1978).

8. Lorillard v. Pons, supra, 29 U.S.C. §626(b); H.R. 805, U.S. Code, Congressional & Admin. News, 90th Cong., 1st Sess., 1967, Vol. 2, p. 2218; Loeb v. Textron, Inc., 600 F.2d 1003, 1020 (1st Cir. 1979); Wehr v. Burroughs Corp., 619 F.2d 276 (3rd Cir. 1980).

This is based on a fundamental tenet of American law, namely, that the jury trial is the foundation of our legal system:

> "'"Maintenance of the jury as a factfinding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." Dimick v. Schiedt, 293 U.S. 474, 486'. . . Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959)." Collins v. Govt. of Virgin Islands, supra, at 284.

Moreover, "since 'the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.' Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937)." Id. See also, Dairy Queen v. Wood, 369 U.S. 469 (1962); Lorillard v. Pons, supra; Pernell v. Southall Realty, 416 U.S. 363 (1974).

Finally, the immunity doctrine has fallen into disfavor with time:

"'But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment.' National City Bank of New York v. Republic of China, 1955, 348 U.S. 356, 359 . . ." Monolith, supra, at 447.

II. THE RIGHT TO JURY TRIAL ARISES BY IMPLICATION FROM THE LANGUAGE OF SECTION 15 OF THE ADEA AND EXPRESSLY FROM THE LANGUAGE OF SECTION 7(b) OF THE ACT.

A. By Implication from the Language In Section 15(c).

1. Exclusive Jurisdiction in the District Courts.

The Court of Appeals relied on the language of 15(c), placing exclusive jurisdiction of federal ADEA suits in the district courts, to infer a right to jury trial. Pet. App., 10a-11a. This reasoning is not without precedent and, in fact, exclusive jurisdiction in the district

courts is one of two critical determinants upon which the inference to jury trial arises by implication from the statute.[9]

The seminal case for this proposition is one decided by this Court, U.S. v. Pfitsch, 256 U.S. at 547:

> "The nature of the jurisdiction of the District Court is of importance, not only because of the question directly involved, but because the answer given to it will determine incidentally whether plaintiffs who proceed under Section 10 are entitled to trial by jury" [of the Lever Act].

---

9. Petitioner is wrong in his contention that pertinent language in 28 U.S.C. §770 concerning what he describes as a statutory grant of general right to jury trial in district court was abolished by the Revision Act of 1948, ch. 646, Section 39, 62 Stat. 992. P. Brief, ftn. 27, pp. 32-34. The history of Sections 9 and 12 of the Judiciary Act of 1789 reveals the close relationship between the Seventh Amendment and the statute. Legislative action on the first 10 Amendments was completed by September 25, 1789. The Judiciary Act was enacted by Congress the day before. "Hence, the contemporaneous interpretation of the Amendment [Seventh] by its framers, as embodied in the terms of the Judiciary Act is of great weight." United States v. One 1976 Mercedes Benz 280S, supra, at ftn. 8, 456, and ftn. 29, 459.

(Continued)

See also, Law v. U.S., 266 U.S. at 496:

> "The jurisdiction possessed was that to be exercised in accordance with the laws governing the usual procedure of the court in actions at law for money compensation [citations omitted]." Accord, Galloway v. U.S., 319 U.S. at 389, ftn. 18. Cf. Halliday v. United States, 315 U.S. 94 (19__), and Berry v. United States, 312 U.S. 450 (19__).

See Prouty v. U.S., supra: (". . . [J]urisdiction was lodged exclusively with the district court . . ." and therefore the court held right to jury trial);

(Footnote 9 continued)

Section 9 of the Judiciary Act is therefore a restatement of the Seventh Amendment in the sense that all civil cases except those in admiralty and maritime jurisdiction (equity was omitted, but cases in equity were not traditionally tried to juries in England in 1789, U.S. v. One 1976 Mercedes Benz 280S, supra, at 458) are suits at common law. Therefore, the language of Section 9 is redundant of the language in Rule 38(a). The Historical and Revision Notes, 28 U.S.C. §1873, which replaced the repealed statute, 28 U.S.C. §770 (formerly 566 and 648 Rev. Stats., which were Sections 9 and 12 of the Judiciary Act), makes clear that the provision for right of jury trials in district courts was omitted as covered by Rule 38 of the Federal Rules of Civil Procedure. 28 U.S.C.A. §1873, Historical and Revision Notes, page 317.

Whitney v. U.S., supra, at 478: ("We cannot find in the Act of March 4, 1925, any provision which takes this case out of the ordinary rule obtaining in the trial of actions at law in the district court"); Hacker v. U.S., supra, at 703: ("Congress undoubtedly considered that, the government having entered a field primarily left to private enterprise, litigants were entitled to the usual court procedure [of jury trial]"); Collins v. Govt. of Virgin Islands, supra, at 283: ("The grant of jurisdiction by the sovereign is an aid in determining the method of trial in the absence of an expressed provision [citations omitted]").

The observation of the Court of Appeals that Congress intended jury trials by vesting exclusive jurisdiction in the

district court is thus well grounded in precedent.[10]

2. The Provision for Legal Relief in Section 15(c).

a. The Lorillard Decision. In Lorillard, supra, this Court held that in addition to incorporating into the ADEA the provisions of the FLSA, its inference of right to jury trial in ADEA suits is further supported by the use of the term "legal relief" in the statute.

---

10. We agree with Petitioner that Congress probably vested exclusive jurisdiction in the district courts also because the district courts already had jurisdiction of nonfederal ADEA cases, 29 U.S.C. §626(c), thus demonstrating an intent on the part of Congress to establish identical rights, remedies and procedures for individuals in both federal and nonfederal employment as well as an intent that all of the sections of the act in pari materia should be interpreted and construed together. P. Brief, 30-31.

This Court stated:

> "'[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary.' Standard Oil v. United States, 221 U.S. 1, 59 (1911). See Gilbert v. United States, 370 U.S. 650, 655 (1962); Montclair v. Ramsdell, 107 U.S. 147, 152 (1883). We can infer, therefore, that by providing specifically for 'legal' relief, Congress knew the significance of the term 'legal,' and intended that there would be jury trial on demand to 'enforc[e] . . . liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation.' §7(b), 29 U.S.C. §626(b)." [Footnote omitted].

See also, Sands, Sutherland Statutory Construction, Vol. 2A, §50.03, p. 278:

> "Furthermore, common law meanings are assumed to apply even in statutes dealing with new and different subject matter than that which comprised the legal context at common law to the extent that they appear fitting and in the absence of evidence to indicate contrary meaning."

b. Other Case Law Precedent. Prior to Lorillard, this Court reached the same conclusion in a case where the action involved a legal remedy:

> ". . . [W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves right and remedies of the sort typically enforced in an action of law. Curtis v. Loether, 415 U.S. 189, 195 (1974).
>
> See also Pernell v. Southall Realty, 416 U.S. 363, 375, 383 (1974); Kohl v. United States, 91 U.S. 367, 375-76 (1875)." U.S. v. One 1976 Mercedes Benz 280S, supra, ftn. 21.

This Court found a right to jury trial by implication from §3226, Revised

Statutes, in tax refund suits in Wickwire v. Reinecke, supra, at 105. See also, Wilson v. United States, 530 F.2d 772 (8th Cir. 1976).

Similarly, the Ninth Circuit determined a right to jury trial in a suit under the Contract Settlement Act of 1944, by first characterizing the suit as one for monetary compensation and then by relying on Pfitsch, concluding that a right to jury trial is an "'incident'" to such suits. Monolith, supra, at 446.

As the Seventh Circuit stated:

> ". . . [I]f Congress creates a new statutory right (without providing a special statutory proceeding for enforcement) and relegates parties to their common law remedies (such as a civil action for collection of a sum certain, . . .) then the ordinary common law remedy carries with it its ordinary incident of jury trial." (Emphasis added). U.S. v. One 1976 Mercedes Benz 280S, supra, ftn. 21. at 458, ftn. 21.

See also, Collins v. Govt. of Virgin Islands, supra, at 283: ("Our conclusion [of right to jury trial] is further supported by the fact that this was an action at law" relying on Pfitsch, supra); and Leimer v. Woods, supra: (right to jury trial, since the matter of recovery of damages has been left to the general language of the statute within the traditional scope of the common law actions of debt).

The Court of Appeals' reliance on the appearance of the term "legal relief" in the text of Section 15(c) to find by implication a right to jury trial is, like its reliance on the fact of exclusive jurisdiction of the district courts over federal ADEA suits, an inference based on unbroken precedent.

3. Remedies and Procedures in Section 15 of the ADEA.

Petitioner, like the employer in Lorillard, argues that the enforcement scheme set out in Section 15 is modeled after Title VII, which does not allow jury trials, and therefore, the term "legal relief" should not be given its well-established common law meaning. P. Brief, 35-41.

This Court rejected such a reliance as being misplaced: ". . . [I]n deciding whether a statutory right to jury trial exists, it is the remedial and procedural provisions of the two laws that are crucial and there we find significant differences." (Ibid., at 9).

There are significant differences between the remedial and procedural provisions of Title VII, Section 717, 42 U.S.C. §2000e-16, and Section 15 of the ADEA, 29 U.S.C. §633a.

29 U.S.C. §633a(c) allows the federal employee to bypass completely the

administrative remedy set out in Section 633a(b) by filing a notice of intent to sue with the Equal Employment Opportunity Commission 30 days prior to filing suit, and after filing suit may be awarded legal and/or equitable relief. Such a bypass of the administrative remedy is not permitted, nor is it possible to obtain legal relief under Title VII. See 29 U.S.C. §1613, which sets out the administrative complaints procedure under Title VII. See also, §§717(b)(c)(d); and §706(g), Title VII, 1964 Civil Rights Act as amended, 42 U.S.C. §2000e, et seq.

This notable departure from the Title VII scheme was recognized by Congressperson Randall:

> "The Civil Service Commission utilizes the same administrative mechanism established under the Equal Employment Opportunity Commission to handle discrimination complaints based on race, color, religion and national origin.
>
> . . .

> However, under the civil service proceeding, this continuous informal conciliation and informal administrative proceeding, the individual can file a civil action in federal court prior to completing the administrative proceeding.
>
> In that particular situation, age discrimination differs from other EEO cases." Statement of Congressperson Randall, Hearings before Subcommittee on Equal Opportunities of the Committee on Education and Labor, 94th Cong., 2d Sess., on H.R. 14879 and H.R. 15342, at 5.

As stated in our brief in opposition (p. 6) to the Petition for Writ of Certiorari, the procedure and remedies are modeled after Sections 7(c) and (d):

> ". . . [F]ederal employees, like nonfederal employees, are entitled to file suit without going through an administrative remedy, with the difference being the federal employee need only wait thirty days to go to the courts after serving a notice of intent to sue on the EEOC, 29 U.S.C. §633a(d); whereas, a nonfederal employee must wait at least sixty days to go to court after serving a charge of age discrimination on the EEOC, 29 U.S.C. §626(d)."

B. By Express Grant of Jury Trial In Section 7(c)(2) of the ADEA, 29 U.S.C. §626(c)(2).

The right to a jury trial is expressly granted in 29 U.S.C. §626(c)(2). To conclude that such a grant is to be read in isolation contravenes established principles of statutory construction.

1. Inferring a Right to Jury Trial Or Applying the Provision of §626(c)(2) to Federal ADEA Suits Is Not Repugnant to the Purposes of the ADEA.

In 1961, the ADEA was first enacted Its purpose is to ". . . promote employment of older persons based on their ability rather than age, to prohibit arbitrary age discrimination in employment, to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. §621.

In 1974, Congress amended the Fair Labor Standards Act by expanding the definitions of employee and employer to

include federal, state and other public employees. See 29 U.S.C. §203(d); 29 U.S.C. s203(e)(2). Fair Labor Standards Amendments ("FLSA") of 1974, Pub. L. 93-259, 93d Congress, 2d Sess., 88 Stat. 54, 58-29, 74-75. Thus, federal employees can now bring FLSA and Equal Pay Act suits for unpaid minimum wages and overtime compensation, as those terms are used in 29 U.S.C. §216(b)

By means of the same amendments, the ADEA was amended to include federal and other public employees. Nothing in the legislative history of the 1974 FLSA suggests that Congress meant to limit the liability of the federal government or that the rights, remedies or procedures of the FLSA would not apply to federal ADEA cases.

The act was again amended in 1978, with a primary purpose: ". . . to strengthen and broaden the provision of

the ADEA to insure that older individuals who desire to work will not be denied employment opportunities solely on the basis of age. This would be done by raising the current upper age limit of 65 in the ADEA to age 70. . . . This legislation does not affect the upper age limit of the act with respect to coverage of those Federal employees specified in Section 15(a) of the Act." S.R. No. 95-493, p. 1, as reported in Code and Congressional Administrative News, 95th Cong., 2d Sess. at 976.

It is significant that the purpose of the 1978 ADEA Amendments is to broaden, rather than to limit the scope of the act's applicability. None of the amendments abrogate the rights, remedies and procedures afforded by the act to "persons aggrieved," including those protected by Section 15 of the Act.

It is not inconsistent to construe the ADEA in pari materia with the FLSA, thus affording jury trial under Section 15 of the ADEA. Furthermore, the absence of any express denial in the ADEA of jury trial in suits brought under Section 15, and the legislative history and articulated purposes of the act and its amendments, warrant an inference that the jury provision of 29 U.S.C. §626(c)(2) controls.

2. Construing Section 15 in pari Materia with Other Sections of the Act Justifies a Conclusion of Right to Jury Trial Under Section 15 of the ADEA.

It is a basic tenet of statutory construction that

> "[P]rovisions in an act which are omitted in another act relating to the same subject matter will be applied in a proceeding under the other act, when not inconsistent with its purposes. Prior statutes relating to the same subject matter are to be compared with the new provision; and if possible by reasonable construction,

> both are to be so construed that effect is given to every provision in all of them." Sands, ibid., §51.02, at 290.

A fortiorari, such a tenet applies with even greater force to sections in pari materia with sections of the same act, particularly when, as in this instance, both sections of the act empower the court to make awards "for such legal and equitable relief as will effectuate the purposes of this Act." 29 U.S.C. §626(c)(1); 29 U.S.C. §633a(c).

Nothing in the legislative history of the ADEA or of the amendments suggests that this basic tenet of statutory construction should be abandoned.

3. Neither Section 15 Nor Any Other Section of the ADEA Restricts the Meaning of "Legal Relief" As Used in 29 U.S.C. §633a(c).

In 1978, a new subsection was added to Section 15 of the ADEA, Section 15(f), 29 U.S.C. §633a(f). The legislative

history surrounding this amendment is obscure (but cf. pp. 19-27, Brief for Members of Congress as Amici Curiae). However, the thrust of the purpose of the 1978 ADEA Amendments is not to restrict the rights or remedies or procedures of "persons aggrieved" filing suit under the provisions of Section 15 of the act, but rather, to eliminate the upper age limit entirely for federal employees, Section 12(b), 29 U.S.C. §631(b), and to expand the mandatory retirement age for most non-federal employees, except for certain classes of employees described in Sections 12(c) and 12(d), 29 U.S.C. §631(c) and (d).

There is no legislative history demonstrating an association between Section 15(f) and Section 7(c)(2). As noted by our amicus, AFGE: "[L]ike the amendments to Sections 15(a) and 12(a) lifting

the upper age limit for federal employees, Section 15(f) was given an effective date of September 30, 1978, six months beyond the date of enactment. The jury trial amendment, on the other hand, took effect on the date of enactment (April 26, 1978)." Brief for AFGE as Amicus Curiae, p. __.

Even if Section 15(f) is interpreted as a prohibition against construing the ADEA statute as a whole, nonetheless, the provisions of Section 15 still apply, thus preserving the right of the person aggrieved by the federal government to file suit in district court and to seek legal relief, 29 U.S.C. §633a(c).

Although Petitioner argues in his brief (P. Brief, 28-29), as he did in his Petition for Writ of Certiorari (Pet. 6-7), that Section 15(f) by its terms prohibits the application of any other provision of the ADEA, in particular, the provision

for jury trial in Section 626(c)(2), he did not raise this argument in the courts below, thus denying an opportunity to the district court and to the Court of Appeals to rule on the argument before this Court passes on its merits.

Further, Petitioner's interpretation of the provisions of Section 15(f) is contradictory to the position it took in Moysey v. Andrus, 481 F. Supp. 850 (D.D.C. 1979). In Moysey, the government argued that the federal employee seeking to certify a class action under the ADEA, had to meet the "opt-in" requirement of 29 U.S.C. §216, which the court found ". . . mutually exclusive with the Federal Rules regarding class actions. See, e.g., La Chapelle v. Owens-Illinois, Inc., 513 F.2d 286, 289 (5th Cir. 1975)." 21 EPD, at ¶13,691.

The government's argument was that the provisions of Section 7(b) apply to actions brought under Section 15 of the Act, and therefore, by express reference, the provisions of 29 U.S.C. §§211(b), 216 (b), 217 and subsection (c) of Section 7 are applicable to Section 15 ADEA suits, a position directly antithetical to what Petitioner presents to this Court at this time.

There are other compelling reasons for concluding that the provisions of Section 15(f) are intended to protect federal employees from the employer defenses set out in Section 4(f)(2), from the exceptions to ADEA coverage in Section 11(f), and from the restrictions or qualifications in Sections 12(a), (c) and (d), rather than to deny them any rights, remedies or procedures nonfederal employees under the act enjoy.

What constitutes an illegal act of age discrimination or reprisal is not defined in Section 15, but rather, in Section 4, 29 U.S.C. §623. Similarly, no description of what kinds of legal or equitable relief the court can award in federal ADEA cases appears in 29 U.S.C. §633a(c). However, such enumeration does appear in Section 626(b).

Not surprisingly, the description of what form the relief ordered by the Court can take, which is found in 626(b) -- reinstatement, promotion, enforcing the amounts deemed to be unpaid minimum wages and overtime compensation -- is identical to the kinds of relief the EEOC can order for persons aggrieved in federal employment -- reinstatement or hiring of employees with or without backpay (the amounts owing and deemed unpaid minimum wages and overtime compensation in Section 626(b)).

To argue that Section 15(f) limits or denies rights, remedies or procedures to persons aggrieved in federal employment is, in effect, claiming special privilege for the federal government as an employer.

As the court stated in Harris v. U.S. Dept. of the Treasury, 489 F. Supp. 476 (N.D. Ill., 1980):

> "In order to find that Congress intended to deny this right in ADEA suits brought by governmental employees, this Court would require more convincing evidence of congressional intent to achieve this purpose than has been provided by defendants. In some cases, perhaps evidence that governmental interests would be frustrated by permitting jury trials might be persuasive. (Footnote omitted). In this case, however, the defendants have identified no governmental interest that would be affected adversely by allowing jury trials in public employee ADEA suits."

In addition, Attorney General Bell has ordered attorneys under his supervision not to take positions claiming a special status or role for the federal

government in employment discrimination claims:

> "In a similar vein, the Department will not urge arguments that rely upon the unique role of the Federal Government. For example, the Department recognizes that the same kinds of relief should be available against the Federal Government as courts have found appropriate in private sector cases, including imposition of affirmative action plans, back pay and attorney's fees. . . . [citations omitted]. Thus, while the Department might oppose particular remedies in a given case, it will not urge that different standards be applied in cases against the Federal Government than are applied in other cases." (Emphasis added). Memorandum for United States Attorneys and Agency General Counsels from Attorney General Bell, Aug. 31, 1977, p. 2.

III. The Legislative History of the ADEA.

A. ADEA, 1967

In summarizing Section 7 of the ADEA, House Report 805 emphasizes that Section 7,

among other things, ". . . provides for the enforcement of the act in accordance with the powers, remedies and procedures of Sections 11(b), 16 (except (a) thereof), and 17 of the Fair Labor Standards Act of 1938, and Section 7 of this Act. . . . [L]iquidated damages will be payable only for willful violations." U.S. Congressional and Administrative News, 90th Cong., 1st Sess., 1967, at 2218.

From the onset, Congress was well aware that a jury trial was inevitable for ADEA cases, as this Court pointed out in Lorillard, since jury trials had been available for years in FLSA cases.

B. The Fair Labor Standards Amendments of 1974

In 1974, as already indicated, Congress simultaneously amended both the Fair Labor Standards Act itself and the ADEA to include federal employees under

the provisions of both acts, thus enabling federal employees to bring FLSA claims, Equal Pay Act claims, and ADEA claims to court.

Nothing in the legislative history of the FLS Amendments suggests that federal employees were to be treated any differently in terms of rights, remedies and procedures under the ADEA.

The application of the ADEA to federal employees was seen as a "logical extension of the Committee's decision to extend FLSA coverage to Federal, State, and local government employees." S. Rep. No. 93-690, 93d Cong., 2d Sess. 55 (1974). Moreover, the omission of federal employees from the ADEA as originally enacted "did not represent a conscious decision by Congress to limit the ADEA to employment in the private sector" but reflected only the fact that most governmental employees were not then subject to the FLSA.

Id. This close linkage between the FLSA and the ADEA, which was acknowledged with explicit reference to federal government employees, provides further evidence that the use of FLSA procedures, including jury trial, was intended for ADEA actions against the government. [By permission of Terry Coleman, from Appellee's Brief below, p. 10].

C. The 1978 ADEA Amendments

There is no statement in the legislative history suggesting that the statutory right to jury trial would not be available to federal employees. The principal reason for amending the ADEA in 1978 was to extend the upper age limit of 65 to 70, to clarify an existing section of the act to prohibit mandatory retirement based on benefit plans or seniority systems, to extend protection against all forms of age

discrimination to the workers in the expanded age group (65-70), and to eliminate the upper age limit for federal employees. S.R. No. 95-493, 95th Cong., 2d Sess. 1 (1978). Nothing is mentioned about the right to jury trial.

On September 23, 1977, the House passed H.R. 5383, which was silent on the issue of jury trial. However, on October 19, 1977, Senator Edward Kennedy introduced an amendment to include an express grant of jury trial in the statute. 123 Cong. Rec. S.17297 (daily ed., Oct. 19, 1977). In the meantime, this Court decided Lorillard in February 1978, holding that parties are entitled to jury trial under the ADEA.

By the time the bill was reported by conference committee on March 14, 1978, the Lorillard decision had already been issued. Thus, the conference report

stated that the purpose of the codification of the right to jury trial also extended to any issue of fact regarding liquidated damages, since this Court had not decided that issue in Lorillard, supra, at 577, n. 2. Furthermore, the conference report stated:

> "The Senate amendment provides that in any civil action brought by a person alleging discrimination on account of age there shall be a right to a jury trial."
> . . .

There is no distinction between actions concerning nonfederal employment and those concerning federal employment. 125 Cong. Rec. H-2000 (daily ed., March 14, 1978).

The traditional view in statutory construction is that:

> "Although comments about an earlier act in a legislative committee report on a subsequent bill are not part of the legislative history of the earlier act and therefore have less probative force than legislative history, they are entitled to

> consideration as an expert opinion concerning its proper interpretation. Sands, ibid., at 266.

Thus, the statement Congressperson Pepper placed in the Congressional Record concerning congressional intent on the issue of jury trial in federal ADEA cases is of assistance to this Court in determining such intent:

> "Those who participated in the House and Senate debates [on the amendment] would be surprised to learn that legislative efforts to confirm the right to a jury trial have been construed as a denial of that right. It would be indefensible to deny Federal employees the right to a jury trial. Under any legislative enactment in the field of civil rights, the Federal Government should be the leader not a grudging participant. . . . As chairman of the Committee on Aging, I will continue to watch developments in this area, and will ask for further delineation of the right of Federal employees to a jury trial if conflicting judicial interpretations are not resolved in favor of a jury trial." 125 Cong. Rec. E-4258 (daily ed., Sept. 9, 1979).

IV. Federal ADEA Suits Comprise A Small Percentage of Cases In Which the Government Is Involved, and There Is A Jury Demand.

The Petition for Writ of Certiorari states at p. 13 that "[j]ury trials in ADEA cases generally would increase the time and expense of litigating these cases and would add to the congestion in the courts."

In January and February 1981, three law students from Georgetown Law Center, Judy Shapiro, Christine McKinnon and Thomas Wassel,[11] examined the cover

11. This author wishes to acknowledge publicly the invaluable assistance of Ms. Shapiro, Ms. McKinnon and Mr. Wassel provided to her on a volunteer basis. Taking time out from their hectic first-year law school schedules, they completed the research asked of them in an accurate and timely fashion. In addition, they assisted the writer in reading cases and the legislative history, and in analyzing the data from the research on the cover sheets. Further thanks goes to Frances Sanchez who spent many hours typing this brief, and to Maria Holleran and Eileen O'Brien who gave last-minute assistance to the writer, without hesitation or remuneration, interrupting their own busy work and law school schedules to shepardize and copy cases which this writer needed to complete the writing of this brief. All of these individuals are a tribute to the legal profession they will be joining in a few years.

sheets, Form JS-44c, which accompany each complaint filed in district court throughout the country. They examined the cover sheets from January 1979 to January 1981, for a total of 25 months, filed in the U.S. District Court for the District of Columbia, where the greatest number of government cases are litigated.

The students found 189 jury demands in which the government is a party in the two-year period. Of these 189 jury demands, 18 are ADEA suits and 14 are suits in which the government made the jury demand. Thus, federal ADEA suits comprise 9.5% of government litigation involving a jury demand, only 2% greater than the number of jury demands made by the federal government itself.

V. Conclusion

Respondent seeks the following relief: That the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

PATRICIA J. BARRY
1066 National Press Building
Washington, D.C. 20045
(202) 347-6463

Attorney for Respondent

No. 80-242

MAR 24 1981
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN F. LEHMAN, SECRETARY OF THE NAVY, PETITIONER

v.

ALICE NAKSHIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases: Page

Bagur v. *Commissioner*, 603 F.2d 491 15
Barrett v. *United States*, 423 U.S. 212 12
Blake v. *Califano*, 626 F.2d 891 8
Carlson v. *Green*, 446 U.S. 14 15
Chandler v. *Roudebush*, 425 U.S. 840 8
Claytor v. *Saunders*, 629 F.2d 596, cert. denied, No. 80-995 (Mar. 9, 1981) 8
Collins v. *Government of the Virgin Islands*, 366 F.2d 279, cert. denied, 386 U.S. 958 16
DeFries v. *Haarhues*, 488 F. Supp. 1037 12
deWeever v. *United States*, 618 F.2d 685 8
Dorl v. *Commissioner*, 507 F.2d 406 15
Fedorenko v. *United States*, No. 79-5602 (Jan. 21, 1981) 2
Fischer v. *Adams*, 572 F.2d 406 8
Franquez v. *United States*, 604 F.2d 1239 ..... 15, 17
Galloway v. *United States*, 319 U.S. 372 ..... 1, 2, 14
Glidden Co. v. *Zdanok*, 370 U.S. 530 4
Hacker v. *United States*, 16 F.2d 702 14
Harris v. *U.S. Department of Treasury*, 489 F. Supp. 476 12
Holliday v. *United States*, 87 F. Supp. 367 14
Keifer & Keifer v. *Reconstruction Finance Corp.*, 306 U.S. 381 17
Law v. *United States*, 266 U.S. 494, rev'g 290 F. 972 14
Lorillard v. *Pons*, 434 U.S. 575 ..... 3, 6, 9
McElrath v. *United States*, 102 U.S. 426 4
Monolith Portland Midwest Co. v. *Reconstruction Finance Corp.*, 240 F.2d 444 16-17
Moysey v. *Andrus*, 481 F. Supp. 850 12
Prouty v. *United States*, 94 F. Supp. 320 14
Richerson v. *Jones*, 551 F.2d 918 8
United States v. *King*, 395 U.S. 1 4
United States v. *McGovern*, 299 F. 302 15
United States v. *Pfitsch*, 256 U.S. 547 13
United States v. *Testan*, 424 U.S. 392 13
United States v. *Thomas*, 53 F.2d 192 14

Cases—Continued Page

Whitney v. *United States*, 8 F.2d 476 14
Wickwire v. *Reinecke*, 275 U.S. 101 15

Constitution, statutes and rules:

United States Constitution, Seventh Amendment.. 3, 15
Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 *et seq.*:

Section 4, 29 U.S.C. 623 5
Section 4(f), 29 U.S.C. 623(f) 10
Section 7, 29 U.S.C. 626 .....3, 5, 11
Section 7(b), 29 U.S.C. 626(b) 2, 5, 7, 9, 11, 12, 13
Section 7(c), 29 U.S.C. 626(c) 2, 5, 9
Section 7(c)(2), 29 U.S.C. 626(c)(2) 2
Section 11(b), 29 U.S.C. 630(b) 5, 10
Section 11(c), 29 U.S.C. 630(c) 10
Section 12, 29 U.S.C. 631 10
Section 12(a), 29 U.S.C. 631(a) 10
Section 12(b), 29 U.S.C. 631(b) 10, 11
Section 15, 29 U.S.C. 633a 1, 2, 4, 5, 6, 7, 9, 11, 12
Section 15(a), 29 U.S.C. 633a(a) 7
Section 15(b), 29 U.S.C. 633a(b) 7
Section 15(c), 29 U.S.C. 633a(c).....4, 7, 9, 12, 13, 15
Section 15(d), 29 U.S.C. 633a(d) 4
Section 15(f), 29 U.S.C. (Supp. III) 633a(f).. 10, 12
Section 15(f), 29 U.S.C. (Supp. III) 633a(f).. 9, 10

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.*:

Section 706, 42 U.S.C. 2000e 8
Section 717, 42 U.S.C. 2000e-16 ..... 4, 7, 8
Section 717(b), 42 U.S.C. 2000e-16(b) 6, 7
Section 717(c), 42 U.S.C. 2000e-16(c) 4, 7, 8

Equal Access to Justice Act, Pub. L. No. 96-481, Title II, 94 Stat. 2321 *et seq.*:

Section 203(a)(1), 94 Stat. 2325 11
Section 204(a), 94 Stat. 2328 11

Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*:

Section 4(f), 29 U.S.C. 204(f) 6, 7
Section 16, 29 U.S.C. 216 ..... 5, 11

Constitution, statutes and rules—Continued Page

Section 16(b), 29 U.S.C. 216(b) 3, 6, 7, 11, 12
Section 17, 29 U.S.C. 217 5

Lever Act, ch. 53, Section 10, 40 Stat. 279 13
Tucker Act:

Section 2, 24 Stat. 505 18
Section 6, 24 Stat. 506 18
28 U.S.C. 1346(a)(2) 4
28 U.S.C. 1491 4

War Risk Insurance Act of 1917, ch. 105, 40 Stat. 398 14
World War Veteran's Act, 1924, ch. 320, Section 19, 43 Stat. 613 14
World War Veteran's Act Amendments, ch. 553, Section 2, 43 Stat. 1302-1303 14
5 U.S.C. 504 11
28 U.S.C. 2402 ..... 4, 18
28 U.S.C. 2412(b) 11
28 U.S.C. 2674 11-12
Federal Rules of Civil Procedure:

Rule 23 11
Rule 38 1
Rule 71A(h) 17

Miscellaneous:

18 Cong. Rec. (1887):

p. 623 18
p. 2175 18
p. 2677 18

H.R. 6974, 49th Cong., 1st & 2d Sess. (1886 & 1887) 18
H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. (1978) 5, 11
H.R. Rep. No. 95-527 (Pt. I), 95th Cong., 1st Sess. (1977) 10, 11
H.R. Rep. No. 1518, 68th Cong., 2d Sess. (1925).... 14

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-242

JOHN F. LEHMAN, SECRETARY OF THE NAVY, PETITIONER

v.

ALICE NAKSHIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

---

1. Respondent concedes (Br. 14-15) that the Seventh Amendment right to trial by jury in suits at common law does not extend to suits against the United States. Accordingly, she acknowledges that there is no right of trial by jury in actions against the federal government unless "Congress, in the legislation cited, has made it applicable" (*id.* at 17, quoting *Galloway* v. *United States*, 319 U.S. 372, 389 (1943)). Rule 38 of the Federal Rules of Civil Procedure states the same principle: where the Seventh Amendment does not apply, the right to trial by jury is preserved to the parties only "as given by a statute of the United States." The specific question presented, then, is whether Congress affirmatively granted the right to trial by jury in actions against the federal government under Section 15 of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a. Respondent's extended introductory discussion of jury trials generally

(Br. 14-39)—in cases brought *by* the United States as well as against it (albeit under other statutes), and in cases in which the federal government is not even a party—does not focus on this question. We therefore shall first address arguments that specifically relate to the ADEA.

Section 15 of the ADEA makes no reference to jury trials. This omission is in marked contrast to the express grant of the jury trial right in Section 7(c)(2) of the Act, 29 U.S.C. (Supp. III) 626(c)(2), in civil actions against private employers and state and local governments. As we argue in our opening brief (Govt. Br. 17), because Congress demonstrated in the very "legislation cited" (*Galloway* v. *United States*, *supra*, 319 U.S. at 388) that it knew how to grant a right to trial by jury when it so desired, and yet declined to do so in Section 15 for suits against the federal government, "traditional principles of statutory construction * * * compel[] the conclusion" that suits under Section 15 are not to be tried to a jury. *Fedorenko* v. *United States*, No. 79-5602 (Jan. 21, 1981), slip op. 20-21. And, as we have explained (Govt. Br. 11-14, 29), this conclusion conforms to Congress' usual practice of declining to provide for trial by jury when it waives the United States' sovereign immunity to suit, even though jury trials may be available in comparable lawsuits against private parties.

2. Respondent nonetheless argues (Br. 50-70) that Congress intended that procedures in suits under Section 15 of the ADEA would generally be the same as those followed under Section 7 and that a right to trial by jury therefore should be recognized in suits against the federal government under Section 15 even though Congress did not expressly so provide. She points out (Br. 54, 64-65) that when Congress enacted the ADEA in 1967 to prohibit age discrimination in private employment, it provided in Section 7(b) of the ADEA, 29 U.S.C. 626(b), that this prohibition would be enforced in accordance with the "powers, remedies, and procedures"

provided in certain sections of the Fair Labor Standards Act of 1938 (FLSA). In *Lorillard* v. *Pons*, 434 U.S. 575 (1978), the Court held that Congress could be presumed to have been aware that a right to trial by jury had been recognized in actions brought against private employers under Section 16(b) of the FLSA, 29 U.S.C. 216(b), to recover unpaid minimum wages or overtime compensation. Based on this presumption, the Court inferred that when Congress incorporated FLSA enforcement "powers, remedies, and procedures" in Section 7 of the ADEA, Congress intended that a jury trial would also be available in suits under Section 7 of the ADEA. 434 U.S. at 580-583. Based on her premise that Congress patterned suits under Section 15 of the ADEA after those under Section 7, respondent asks the Court to add to the inference drawn in *Lorillard* the further inference that Congress intended that jury trials would be available against the federal government. See also briefs of amici Members of Congress (at 15-17, 24-25) and AFGE (at 15-19). This argument fails for two reasons.

First, as we pointed out in our opening brief (Govt. Br. 36 n.29), the decisions cited by the Court in *Lorillard* (434 U.S. at 580 n.7) for the proposition that a right to trial by jury had been recognized in suits against private employers under the FLSA all appear to have rested on the Seventh Amendment, not on a conclusion that the FLSA itself grants such a right. Because the Seventh Amendment does not apply in suits against the federal government, there would be no comparable right to trial by jury in FLSA suits against the federal government under 29 U.S.C. 216(b). Therefore, even if Congress intended to incorporate the FLSA enforcement scheme into Section 15 of the ADEA, there would be no basis for inferring a right to jury trial.[1] Second, as we explained

[1] 29 U.S.C. 216(b) provides that an employer "shall be liable" for the amount of unpaid minimum wages or overtime compensation and authorizes an employee to bring an action to "recover such liability * * * in any Federal or State court of competent juris-

in our opening brief (Govt. Br. 20-26), Congress *rejected* the FLSA model when it enacted a separate section applicable only to federal employment and instead patterned Section 15 of the ADEA after Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16,[2] under which there is no right to trial by jury even in suits against private employers.

Because age discrimination in federal employment is covered by a separate section of the Act, the federal government is excluded from the definition of the term

---

diction." Thus, a suit under the FLSA by a federal employee would appear to be a suit for "actual, presently due money damages" (*United States* v. *King*, 395 U.S. 1, 3 (1969)), for which the "court of competent jurisdiction" is the Court of Claims (28 U.S.C. 1491) or, if the amount in controversy does not exceed $10,000, a federal district court (28 U.S.C. 1346(a)(2)). Jury trials clearly are not available in suits under the Tucker Act in either forum. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 572 (1962) (Harlan, J.); *McElrath* v. *United States*, 102 U.S. 426, 440 (1880); 28 U.S.C. 2402. If federal sector FLSA cases must be brought under the Tucker Act, this would furnish an additional reason for not inferring a right to trial by jury in suits against the federal government under the ADEA—even assuming, contrary to our submission above, that Congress intended to follow the FLSA model when it enacted Section 15 of the ADEA.

[2] Section 15 of the ADEA is not, of course, a verbatim replication of Section 717 of the Civil Rights Act of 1964. Respondent notes (Br. 50-52), for example, that a federal employee can bypass the EEOC administrative process under the ADEA simply by filing a notice of intent to sue with the EEOC pursuant to Section 15(d) and waiting 30 days; he cannot do so under Title VII. And amicus AFGE observes (Br. 6-7) that Section 15(c) of the ADEA provides for the award of "legal or equitable relief," but Section 717(c) of the Civil Rights Act of 1964 does not. However, neither of these differences between the two sections undercuts our submission that Congress *rejected* the FLSA model, which was the principal source of the jury trial right recognized in *Lorillard*. Respondent's point has no bearing whatever on the jury trial issue. And the distinction noted by AFGE is merely another way of saying that the presence of the word "legal" in Section 15(c) of the ADEA is indicative of an intent to grant a right to trial by jury. That argument is without merit, as explained in our opening brief (Govt. Br. 35-41).

Beebe v. United States, No. 326-79C (Ct. Cl. Jan. 28, 1981), slip op. 8.

"employer" in Section 11(b) of the ADEA, 29 U.S.C. 630(b), as that term is used elsewhere in the Act. The federal government therefore continues to be excluded from the coverage of the substantive prohibitions and exemptions in Section 4 of the ADEA, 29 U.S.C. 623, that apply to "employers." And because the federal government is not an "employer" for purposes of Section 4, it also is not subject to the provision in Section 7(b) of the Act that deems a violation of Section 4 to be a violation of the FLSA. Hence, the requirement in Section 7(b) that enforcement efforts be carried out in accordance with the "powers, remedies, and procedures" under the FLSA simply does not apply to discrimination in federal employment. By the same token, Section 15 itself does not deem violations of that section by the federal government to be violations of the FLSA, does not refer to the enforcement sections of the FLSA (29 U.S.C. 216 and 217), and does not incorporate FLSA "powers, remedies, and procedures." [3]

For the foregoing reasons, respondent's assertion that FLSA procedures, including recognition of a right to

---

[3] It is therefore significant that when Congress amended Section 7(c) in 1978 expressly to provide for jury trials in suits brought under that section, it made such trials available in any action "for recovery of amounts owing as a result of a violation * * *." Under Section 7(b), such "amounts owing" as a result of a violation are deemed unpaid minimum wages and overtime compensation subject to recovery under the FLSA. Moreover, the discussion on the jury trial issue in the Conference Report on the 1978 amendments makes clear that the jury trial right is available to recover the "amounts owing" that are deemed to be liable under the FLSA. See H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 13-14 (1978). Thus, contrary to the contention of respondent (Br. 68-70), amici Members of Congress (Br. 8-10, 18-22, 27-30), and the court below (Pet. App. 13a-14a), it seems clear from these references to "amounts owing" and the FLSA in the text and legislative history of the 1978 jury trial amendment to Section 7 that the rationale and intent of that amendment do not extend to actions against the federal government under Section 15, which does not refer to "amounts owing" or incorporate FLSA remedies or procedures.

jury trial, apply in actions against the federal government under Section 15 is wholly without merit. And because the incorporation of FLSA "procedures" and enforcement provisions in Section 7 of the ADEA was the principal basis for the Court's decision in *Lorillard* finding a right to jury trial in an action brought against a private employer under that section (434 U.S. at 580-583),[4] the reliance on the FLSA and *Lorillard* by respondent (Br. 45, 64-65) and amici Members of Congress (Br. 6-7) and AFGE (Br. 2, 5-7, 22) is misplaced.[5]

3. Amicus AFGE argues (Br. 9-12), however, that Congress enacted a separate section of the ADEA solely in order to vest enforcement responsibility with the Civil Service Commission (CSC). AFGE points out that the CSC, rather than the EEOC, had previously been given responsibility for enforcing Title VII in the federal sector (42 U.S.C. 2000e-16(b)) and that the CSC, rather than the Secretary of Labor, was charged in the FLSA amendments of 1974 with administering the FLSA with respect to federal employment (29 U.S.C. 204(f)). Thus, the argument goes, the enactment of a new Section 15 is indicative only of an intent to utilize an existing administrative enforcement scheme and therefore sheds no light on the jury trial question. This contention is incorrect.

a. Although Congress did authorize the CSC to administer the FLSA with respect to federal employees,

---

[4] The other factor cited by the Court—that Sections 7(b) and (c) refer to "legal" as well as "equitable" relief—served only to "buttress[]" the inference drawn primarily from the incorporation of FLSA procedures. 434 U.S. at 583.

[5] The Court held in *Lorillard* (434 U.S. at 580-581) that Congress could be presumed to have been aware that 29 U.S.C. 216(b) had been interpreted in a manner that permitted jury trials in suits brought under that section. Thus, the only inference pertinent to the instant case that could properly be drawn from Congress' *failure* to incorporate 29 U.S.C. 216(b) and the rest of the FLSA enforcement scheme into Section 15 of the ADEA is that jury trials are *not* available in ADEA suits against the federal government.

Congress did not adopt separate substantive provisions applicable only to federal employees, as it did in Section 15(a) of the ADEA. Moreover, 29 U.S.C. 204(f), which confers FLSA administrative authority on the CSC, expressly states that nothing in that subsection "shall be construed to affect the right of an employee to bring an action for unpaid minimum wages, or unpaid overtime compensation, and liquidated damages under [29 U.S.C. 216(b)]." Despite the separate administrative scheme, then, federal employees were authorized to bring a judicial action under 29 U.S.C. 216(b) to recover their employer's liability for unpaid minimum wages or overtime compensation in the same manner as employees in the private sector. In contrast, when Congress enacted a separate Section 15 prohibiting age discrimination in the federal sector and vested enforcement authority in the CSC, it did not provide that federal employees could bring a civil action under Section 7(b) of the ADEA or 29 U.S.C. 216(b) in the same manner as employees in the private sector. Since 29 U.S.C. 204(f) and Section 15 of the ADEA were both enacted as part of the FLSA amendments of 1974, Congress' failure to include in Section 15 a reference to 29 U.S.C. 216(b) or to the private sector enforcement scheme in Section 7 of the ADEA must be regarded as deliberate. Hence, the manner in which Congress drafted Section 15 demonstrates that it intended to accomplish more than merely to assign administrative enforcement responsibility to the CSC.

b. A comparison of Section 15 of the ADEA with Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, compels the same conclusion. Subsection (a) of each section states the substantive prohibition against discrimination in federal employment, and Subsection (b) of each vests enforcement responsibility with the CSC (now the EEOC). Subsection (c) of each then authorizes the person aggrieved to bring a civil action. But there is a critical difference between the two Acts in this regard.

Section 717(c) of the Civil Rights Act provides that the person aggrieved may bring a civil action "as provided in Section 706" of the Act, which establishes the procedure for employees in the private sector and state and local government to sue under Title VII. Section 717(d) also provides that Subsections (f) through (k) of Section 706, as applicable, "shall govern civil actions brought" under Section 717. Relying on these cross-references to Section 706 and explicit statements in the legislative history of the 1972 amendments to Title VII that federal and private employees should be treated alike in pertinent procedural matters, the Court concluded in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), that a federal employee has the same right as a private employee to a trial de novo under Title VII.

Section 15 of the ADEA was patterned after Section 717 of the Civil Rights Act of 1964 and was first offered by its sponsor, Senator Bentsen, shortly after the 1972 amendments to Title VII were enacted (Govt. Br. 23-24). Therefore, the only inference that can be drawn from Congress' failure to include a reference in Section 15 of the ADEA to the parallel civil action provisions for employees in the private sector, as it did in the Title VII provisions relied upon by the Court in *Chandler* v. *Roudebush*, is that Congress did *not* intend that the procedural rights of federal and private employees under the ADEA would be the same.[6]

---

[6] The courts of appeals have uniformly held that because Title VII makes no express provision for payment of interest on back pay awards, the doctrine of sovereign immunity bars such a payment in an action against the federal government, even though interest on back pay awards may be available to private employees under Title VII. *Claytor* v. *Saunders*, 629 F.2d 596 (9th Cir. 1980), cert denied, No. 80-995 (Mar. 9, 1981); *Blake* v. *Califano*, 626 F.2d 891 (D.C. Cir. 1980); *deWeever* v. *United States*, 618 F.2d 685 (10th Cir. 1980); *Fischer* v. *Adams*, 572 F.2d 406, 411 (1st Cir. 1978); *Richerson* v. *Jones*, 551 F.2d 918, 925 (3d Cir. 1977). As we explained in our opening brief (Govt. Br. 10-16), the doctrine of sovereign immunity is also relevant to the availability of jury trials in suits against the government: It is the federal govern-

4. The separate nature of Section 15 that is evident from the circumstances of its original enactment was made even more apparent by the addition in 1978 of a new Subsection (f) to that section. 29 U.S.C. (Supp. III) 633a(f). Subsection (f) provides that "[a]ny personnel action of any [federal] department, agency or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act, other than the provisions of section 12(b) of this Act and the provisions of this section." On its face, Subsection (f) would appear to require that federal personnel actions not be "affected by" or "subject to" Sections 7(b) and (c), which contain the procedural provisions incorporated from the FLSA and the express grant of a right to trial by jury in private sector cases.

Respondent argues (Br. 57-63), however, that Section 15(f) does not bar the application of procedures and remedies available in private sector ADEA cases to suits against the federal government under Section 15(c); rather, she contends, its purpose is to bar the application to federal employment of certain *substantive* provisions to which private employers are subject. A similar argument is advanced by amici Members of Congress (Br. 22-27) and AFGE (Br. 12-19). The AFGE, for example,

---

ment's immunity from suit that renders the Seventh Amendment inapplicable and therefore requires an affirmative grant of the jury trial right in such cases, even though a jury trial may be available against a private party as a matter of constitutional right or statutory inference (cf. *Lorillard* v. *Pons*, *supra*, 434 U.S. at 577). The appellate cases just cited hold that the federal government stands on a different footing under Title VII on matters to which sovereignty is relevant despite the affirmative evidence of congressional intent that federal and private employees generally have the same procedural rights. Because of the absence of such evidence in the ADEA, it follows, a fortiori, that the federal government stands on a different footing under Section 15 for those purposes for which the government is traditionally treated differently because of its sovereign status, such as the availability of jury trials.

points (Br. 13 n.8) to the statement in the House Report on the 1978 amendments to the ADEA that Section 15 "is complete in itself" and that "[r]estrictions and limitations in other parts of the act, such as paragraph (a) of section 12 [which provides an upper age limit of 70 for protection of non-federal employees] and paragraph (f) of section 4 [which allows employers to establish bona fide occupational qualifications and to observe the terms of a bona fide seniority or other benefit plan] do not apply to section 15." H.R. Rep. No. 95-527 (Pt. I), 95th Cong., 1st Sess. 11 (1977). However, it does not appear that the new Subsection (f) of Section 15 was necessary in order to prevent application of these and other substantive provisions of the Act to the federal sector. Subsection (b) of Section 12, 29 U.S.C. (Supp. III) 631(b), separately addresses the issue of an upper age limit in federal employment by removing it altogether. In view of this provision, it seems most unlikely that the upper age limit of 70 in Subsection (a), which was clearly intended to apply only in the non-federal sector, would have been imported into the federal sector if Section 15(f) had not been enacted. In addition, it is evident from the face of the Act that the exceptions in Section 4(f) for bona fide occupational qualifications and seniority and other benefit plans could not have applied to the federal government. These defenses are available only to an "employer, employment agency, or labor organization"; the United States is expressly excluded from the definitions of the terms "employer" and "employment agency" in Sections 11(b) and (c), and the federal government is not a "labor organization." The other sections cited by amicus AFGE (Br. 13) would be inapplicable for the same reason.

Moreover, even if it is assumed that Congress was principally concerned with the possible application of certain substantive provisions contained elsewhere in the Act, it hardly follows that the operation of Section 15(f) is so limited. Its language is expansive, as is its legislative history, despite the specific references in the House

Report to the two substantive sections relied upon by respondent and amici. That same House Report, for example, states that Section 15 "is complete in itself" (H.R. Rep. No. 95-527 (Pt. I), *supra*, at 11). And the Conference Report on Subsection (f) states that the provision "makes it clear that Section 15 of the act relating to federal employment is independent of any other section of the act, except section 12(b) which contains the age limitation for federal employees" (H.R. Conf. Rep. No. 95-950, *supra*, at 11).[7]

---

[7] Amici Members of Congress suggest (Br. 24-25) that to read Section 15 not to incorporate procedures utilized in private sector cases under Section 7 would lead to "illogical" results. They argue, for example, that this would mean that the attorney's fees that may be awarded to an employee who sues under 29 U.S.C. 216(b)—and, hence, to an employee who brings an ADEA claim against a private employer—would not be available to a person who sues the federal government under Section 15 of the ADEA. However, in 28 U.S.C. 2412(b), as added by Section 204(a) of the Equal Access to Justice Act, Pub. L. No. 96-481, Title II, 94 Stat. 2328, Congress now has provided for the award of attorney's fees in an action against the United States or an agency or officer thereof to the same extent that any other party would be liable under the terms of any statute that specifically provides for such an award. Because attorney's fees may be awarded against private employers under the ADEA, they may be awarded in actions against the federal government as well. See also 5 U.S.C. 504, as added by Section 203(a)(1) of the Equal Access to Justice Act, Pub. L. No. 96-481, Title II, 94 Stat. 2325.

Another consequence of Congress' failure to incorporate FLSA procedures into federal sector ADEA cases is that employees are not restricted in bringing class actions under Fed. R. Civ. P. 23 by the requirement in 29 U.S.C. 216(b) that no employee be a party to a suit under that section unless he affirmatively "opts in" to the suit. But this result works to the advantage, not disadvantage, of federal employees, and it is consistent with Congress' decision to pattern federal sector ADEA cases after Title VII cases, where class actions are available. Congress' failure to apply FLSA procedures also bars the award of liquidated damages, which are available in suits under 29 U.S.C. 216 and Section 7(b) of the ADEA. But it is not surprising that Congress would decline to provide for the award of liquidated damages against the government, cf. 28 U.S.C.

5. Despite the compelling contrary indications in the language and legislative history of Section 15 of the ADEA, respondent argues (Br. 41-49) that the right to a jury trial has been affirmatively granted by Congress because Congress authorized the award of "legal or equitable relief" in suits brought under Section 15(c) and provided for such suits to be brought in federal district court rather than in the Court of Claims. These contentions are answered in our opening brief (Govt. Br. 29-41). We make only one further observation here.

As the Court observed in *Lorillard* (434 U.S. at 581), prior to enactment of the ADEA in 1967, the courts had held that injunctive relief is available under the FLSA only in an action brought by the Secretary of Labor, not in suits brought by individual employees. Congress "made plain its decision to follow a different course in the ADEA" (*ibid.*) by providing in Section 7(b) of the

---

2674, and its failure to do so is consistent with the decision to pattern Section 15 of the ADEA after Title VII.

Respondent is correct (Br. 60-61) in asserting that the government has not always taken a consistent position on the meaning of Section 15(f) and the incorporation of FLSA procedures generally into Section 15 of the ADEA. To some extent, this has occurred because of an absence of coordination and a full study of the legal issues in the various districts. In *Moysey* v. *Andrus*, 481 F. Supp. 850 (D. D.C. 1979), for example, the government opposed class certification in a federal sector ADEA case by arguing, *inter alia*, that the "opt in" features under the FLSA, 29 U.S.C. 216(b), should be followed. The district court rejected that contention. In other cases, however, the government has invoked Section 15(f) to oppose the award of attorney's fees that would otherwise be available under 29 U.S.C. 216(b) (see, *e.g.*, *De Fries* v. *Haarhues*, 488 F. Supp. 1037, 1044-1045 (C.D. Ill. 1980)), and to oppose jury trials (see *Harris* v. *U.S. Department of Treasury*, 489 F. Supp. 476 (N.D. Ill. 1980)). This is the first case involving these issues to reach an appellate level; after a careful review of the legal issues, the Department of Justice has now arrived at a consistent litigating position. Cf. *Barrett* v. *United States*, 423 U.S. 212, 222 (1976).

ADEA that equitable relief is available "[i]n *any* action brought to enforce * * *" the Act (emphasis added), including those brought by private parties. Because Congress obviously deemed such relief to be an essential element of a private cause of action under the ADEA, it was sensible for Congress to limit jurisdiction of ADEA suits against the federal government to the district courts, which are accustomed to granting the type of broad equitable relief that is often necessary in employment discrimination cases, and thereby to foreclose jurisdiction in the Court of Claims, which does not have independent jurisdiction to grant equitable relief. *United States* v. *Testan*, 424 U.S. 392, 404-405 (1976). It would be ironic indeed if the jurisdictional limitation in Section 15(c), which has the effect of preserving for the district courts their traditional power to grant *equitable* relief in employment discrimination cases, were held to imply the affirmative grant of a right to trial by jury, which ordinarily applies, if at all, only in suits at law.

Thus, the authorization in Section 15(c) for the award of equitable relief alone distinguishes the dicta in *United States* v. *Pfitsch*, 256 U.S. 547 (1921),[8] upon which respondent primarily relies (Br. 41-42), in arguing that a grant to the federal district courts of exclusive jurisdiction over actions against the federal government implies a right to trial by jury. See also Resp. Br. 3, 21, 28, 34, 48-49. In *Pfitsch*, Section 10 of the Lever Act (ch. 53, 40 Stat. 279), authorized only suits at law to recover a money judgment in the amount of compensation alleged to be due for property requisitioned by the President. Moreover, in *Pfitsch*, as we have noted (Govt. Br. 32-34), Congress had considered and rejected a proposal for such claims to be

---

[8] In *Pfitsch*, the parties agreed to trial by the court sitting without a jury (256 U.S. at 549), and the jury trial issue therefore was not directly before the Court.

brought under the Tucker Act (and, hence, without a jury trial), and the Court could conceive of no rational ground for rejecting that proposal except to confer a right to trial by jury. In the present case, in contrast, there is no indication that Congress gave any thought whatever to conferring jurisdiction on the Court of Claims under the Tucker Act, or that Congress focused on the jury trial issue in federal sector cases.[9]

---

[9] *Law* v. *United States*, 266 U.S. 494 (1925), the other case upon which respondent principally relies (Resp. Br. 3, 17, 25, 34), likewise involved an action at law for money compensation—in that case a suit on a contract of insurance issued under the War Risk Insurance Act of 1917, ch. 105, 40 Stat. 398. Moreover, as we explained in our opening brief (Govt. Br. 35 n.28), the statement in *Law* regarding the availability of jury trials (which merely cites *Pfitsch*, adding nothing to the analysis) is dictum. In any event, *Law* is of no continuing importance on the issue of jury trials under the War Risk Insurance Act. After the district court decision in *Law* (290 F. 972 (D. Mont. 1923)), but prior to this Court's decision in the case, Congress amended the Act to provide that procedures in suits under the Act should be the same as those in cases under the Tucker Act. See World War Veteran's Act, 1924, ch. 320, Section 19, 43 Stat. 612-613. This had the effect of barring jury trials. Just two months after this Court's decision in *Law*, Congress amended the Act (see World War Veteran's Act Amendments, ch. 553, Section 2, 43 Stat. 1302-1303) for the express purpose of "giv-[ing] claimants the right to a jury trial" (H.R. Rep. No. 1518, 68th Cong., 2d Sess. 2 (1925). See generally *Galloway* v. *United States*, 319 U.S. 372, 389 n.18 (1943). The later cases arising under the War Risk Insurance Act cited by respondent (Br. 25-28) all relied on the post-*Law* amendment for the conclusion that jury trials are available. See *Galloway* v. *United States*, *supra*; *Hacker* v. *United States*, 16 F.2d 702, 704 (5th Cir. 1927); *Whitney* v. *United States*, 8 F.2d 476, 478 (9th Cir. 1925); *Prouty* v. *United States*, 94 F. Supp. 320, 321 (D.N.H. 1950). Thus, contrary to respondent's assertion (Br. 25-28, 43-44), these cases are not examples of the recognition of a right to trial by jury against the government where Congress has been silent on the question.

The court in *United States* v. *Thomas*, 53 F.2d 192, 195 (4th Cir. 1931) (Resp. Br. 25), merely observed that the case was tried to a jury, without discussing the legal issue involved here. In *Holliday* v. *United States*, 87 F. Supp. 367, 368 (Ct. Cl. 1949), also cited

6. Finally, respondent argues (25-34) that a right to trial by jury may be inferred from Congress' silence regarding the procedure to be followed in ADEA cases against the federal government. However, with respect to the jury trial issue, Congress has not been silent. It has provided for jury trials in suits against private employers and state and local governments under Section 7(c) of the Act, but has not so provided in suits against the federal government under Section 15(c). This omission must be regarded as deliberate. In any event, the cases upon which respondent relies do not support her argument that silence alone confers the right she would invoke.

Two of the eight categories of cases discussed by respondent involve suits against federal officers in their private, not official capacities, and therefore have no relevance to the question of jury trials against the federal government.[10] A third category includes cases holding that there is *no* right to a jury trial in cases brought in Tax Court. *Bagur* v. *Commissioner*, 603 F.2d 491, 500 (5th Cir. 1979); *Dorl* v. *Commissioner*, 507 F.2d 406 (2d Cir. 1974). These cases, to the extent they are relevant, cut against respondent's position.

---

by respondent (Br. 27), the question of jury trials was not even discussed. *United States* v. *McGovern*, 299 F. 302 (9th Cir. 1924), was decided before this Court's decision in *Law*. As in *Law*, the *McGovern* court stated that jury trials were available under the War Risk Insurance Act, citing *Pfitsch* without further analysis. And as in *Law* and *Pfitsch*, the reference to jury trials was dictum, because the trial had been held without a jury and the judgment was affirmed.

[10] See Br. 18-21, 29, citing, *inter alia*, *Wickwire* v. *Reinecke*, 275 U.S. 101, 105-106 (1927); Br. 32, citing *Carlson* v. *Green*, 446 U.S. 14, 22 (1980). *Wickwire* and other tax refund cases are discussed in our opening brief (Govt. Br. 13-14 n.6). The Court's observation in *Carlson* v. *Green* that the plaintiff in a *Bivens* action against a federal official would have a right to trial by jury apparently referred to the Seventh Amendment guarantee and therefore has no application here.

Three of the other "categories" of cases discussed by respondent each consist of one decision in which a court of appeals has recognized a right to trial by jury under the unique wording of the particular legislation involved; they therefore have no application to the present case. Two of the cases, in fact, were not even against the United States.

Of these cases, respondent places particular reliance (Br. 8, 16, 23-24, 30-32, 44, 49) on *Collins* v. *Government of the Virgin Islands*, 366 F.2d 279 (3d Cir. 1966), cert. denied, 386 U.S. 958 (1967), which involved a tort suit against the Virgin Islands arising out of a traffic accident. Congress had authorized the Virgin Islands to consent to suit (336 F.2d at 382, citing 48 U.S.C. 1541 (b)), and the legislature had done so by passing a private bill allowing the plaintiff to "'*proceed against the Government as in the case of any other defendant, subject to the same procedures and defenses*'" (366 F.2d at 283, quoting Act No. 921; emphasis in original). Because the Virgin Islands expressly elected to be treated as any other tort defendant, and because jury trials ordinarily are available in tort suits between private parties, the Third Circuit concluded that a jury trial was available under the particular statute. Thus, contrary to respondent's contention, *Collins* was not a case in which the legislature was silent regarding the mode of trial. There is no comparable language in the ADEA providing that the federal government may be sued "subject to the same procedures" as any other defendant.

Monolith Portland Midwest Co. v. *Reconstruction Finance Corp.*, 240 F.2d 444 (9th Cir. 1957) (see Resp. Br. 29-30), likewise did not involve a suit against the United States. There, the court held that the plaintiff in a suit under the Contracts Settlement Act of 1944 against the Reconstruction Finance Corporation was entitled to trial by jury. But in that Act, Congress had provided for alternative methods of recovery: the contractor could bring

a suit against the United States under the Tucker Act, in which a jury trial would be barred, or (if the contracting agency was the RFC) an action could be brought "in any court of competent jurisdiction *in accordance with existing law*" (240 F.2d at 446, quoting 41 U.S.C. 113(b)(2); emphasis added). The court concluded that since Congress had separately authorized suits against the RFC " 'in accordance with existing law' " and had mentioned the RFC in an *excepting* clause to a general provision for non-jury suits against the United States under the Tucker Act, Congress intended that the suits be tried to a jury. 240 F.2d at 449. Once again, Congress cannot be thought to have been wholly silent regarding the manner of suit. The court also noted (*id.* at 447) that Congress had permitted the corporation to sue and be sued and that the corporation's activities were outside the ordinary range of the government's sovereign immunity. *Id.* at 446-447, quoting *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381 (1939). These factors do not apply in the present case.

The last of the three appellate cases cited by respondent (Br. 33-34) is *Franquez* v. *United States*, 604 F.2d 1239 (9th Cir. 1979). That case involved suits by landowners in Guam under Section 204 of the Omnibus Territories Act for just compensation from the United States for land acquired at the end of World War II and in succeeding years. The court analogized actions under Section 204 to cases in which the government exercises its power of eminent domain. In such cases, the district court has discretionary authority under Fed. R. Civ. P. 71A(h) to order a jury trial. After noting the district court's observation that, by fair implication, Congress intended that persons suing under Section 204 should have the same rights as those who had contested the issue of fair compensation in condemnation proceedings, the court held that it was similarly within the discretion of the district court to grant a jury trial in suits under that section. The court did *not* hold that the plaintiff had an

absolute right to trial by jury, as respondent argues here.

Aside from the six "categories" of cases just discussed, respondent relies only on *Pfitsch* and cases arising under the War Risk Insurance Act for her argument that a right to trial by jury may be inferred from congressional silence. But, as we have noted (see pages 13-14, *supra*), the Court in *Pfitsch* found that Congress had specifically focused on the jury trial issue. The cases arising under the War Risk Insurance Act, most of which relied on an amendment expressly intended by Congress to confer a right to jury trial, do not support respondent's position for the reasons stated above (see note 9, *supra*). Accordingly, respondent is wrong in asserting that a right to trial by jury in suits against the federal government may be inferred from mere silence—even if the ADEA could be said to be silent on this issue.[11]

---

[11] Respondent seems to suggest (Br. 23-24) that the existence of certain express prohibitions against jury trials in suits against the United States, such as that in 28 U.S.C. 2402, indicates that jury trials are available in suits against the federal government in the absence of such a prohibition. This contention is in error. The bar to trial by jury in 28 U.S.C. 2402 derives from Section 2 of the Tucker Act, ch. 359, 24 Stat. 505, which granted the district and circuit courts concurrent jurisdiction of claims where the amount in controversy was less than $1000 and $10,000, respectively. As first passed by the House, the bill eventually enacted as the Tucker Act (H.R. 6974, 49th Cong., 1st & 2d Sess. (1886 & 1887)) expressly provided, in Section 6, that suits at law brought in the district and circuit courts under Section 2 of the act would be tried to a jury unless the parties waived a jury trial. 18 Cong. Rec. 623 (1887). The Senate, however, deleted the authorization of jury trials in Section 6 of the bill and added a second sentence to Section 2 providing that "[a]ll causes brought and tried under the provisions of this act shall be tried by the court *without* a jury" (18 Cong. Rec. 2175 (1887); emphasis added). The House agreed to the Senate amendment (18 Cong. Rec. 2677 (1887)), and Section 2 was enacted in this form. Thus, the express prohibition against jury trial in cases under the Tucker Act, now contained in 28 U.S.C. 2402, merely reflects the manner in which Congress resolved the conflict between

CONCLUSION

For the foregoing reasons, and for the additional reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1981

---

the House's express *grant* of a right to trial by jury and the Senate bill's express *prohibition* of jury trials. It does not suggest that jury trials are available when Congress has not specifically addressed the question.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 343601 296

No. 80-242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDWARD HIDALGO, SECRETARY OF THE NAVY,
Petitioner

v.

ALICE NAKSHIAN,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

AMICUS CURIAE BRIEF OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL-CIO) IN SUPPORT OF RESPONDENT

JAMES R. ROSA
General Counsel
American Federation of Government Employees (AFL-CIO)
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 737-8700

MARY E. JACKSTEIT
Staff Counsel
American Federation of Government Employees (AFL-CIO)
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 737-8700

March 10, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Interest of the Amicus Curiae	1
Summary of Argument	2
Argument	5
I. The Court of Appeals Correctly Interpreted Section 15 of the ADEA to Accord a Right to Trial by Jury	5
A. The Language of Section 15 Creates a Right to Trial by Jury	5
1. Section 15(c) Provides for Legal as well as Equitable Relief	5
2. Section 15(c) Places Jurisdiction of Actions Brought Against the Federal Government in the District Courts	8
B. Nothing in the Legislative History Reveals an Intent by Congress to Deny the Right to Jury Trial in Cases Brought Under Section 15 of the ADEA	9
1. The 1974 Amendments	9
2. The 1978 Amendments	12
C. Section 15 of the ADEA Does not Exist in a Vacuum	15
D. Congress Intends with Regard to Employment Discrimination, that the Federal Government be on the Same Footing as Other Public and Private Employers	17
II. There is no Automatic Presumption Against Jury Trials in Cases Against the United States, the Court of Appeals Correctly Approached the Case as One Involving an Ordinary Question of Statutory Interpretation and its Task as that of Determining Whether the Statute Expressly or by Fair Implication Provides for Trial by Jury	19
Conclusion	25

INDEX OF CITATIONS

CASES: Page

Barnes v. *Costle*, 561 F.2d 983 (D.C. Cir. 1977) 19
Bradley v. *Kissinger*, 418 F. Supp. 64 (D.D.C. 1976) 18
Braswell v. *Kobelinski*, 428 F. Supp. 324 (D.D.C. 1976) 16
Brown v. *Frito-Lay, Inc.*, 15 FEP Cases 1055 (D. Kan. 1976) 7
Bunch v. *United States*, 548 F.2d 336 (9th Cir. 1977) 16
Chandler v. *Roudebush*, 425 U.S. 840 (1976) 19, 24
Curtis v. *Loether*, 415 U.S. 189 (1974) 3, 7
DeFries v. *Haarhues*, 488 F. Supp. 1037 (C.D. Ill. 1980) 15, 16
Dothard v. *Rawlinson*, 433 U.S. 321 (1977) 19
Douglas v. *Hampton*, 512 F.2d 976 (D.C. Cir. 1975) 19
Edelman v. *Jordan*, 415 U.S. 651 (1974) 21
EEOC v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975) 6
Franquez v. *United States*, 604 F.2d 1239 (9th Cir. 1979) 8, 20
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 19
Haggar Co. v. *Helvering*, 308 U.S. 389 (1940) 17
Hall v. *United States*, 436 F. Supp. 505 (D. Minn. 1977) 16
Harmon v. *May Broadcasting Co.*, 583 F.2d 410 (8th Cir. 1978) 6
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) 21
Law v. *United States*, 266 U.S. 494 (1925) 9
Lorillard v. *Pons*, 434 U.S. 575 (1978) 2, 5, 6, 7, 14, 22
Mason v. *Lister*, 562 F.2d 343 (5th Cir. 1977) 18
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 19
McElrath v. *United States*, 102 U.S. 426 (1880) 23
Morton v. *Mancari*, 417 U.S. 535 (1974) 10
Moysey v. *Andrus*, 481 F. Supp. 850 (D.D.C. 1979) 15, 16

INDEX OF CITATIONS—Continued

	Page
Parks v. *Dunlop*, 517 F.2d 785 (5th Cir. 1975)	19
Pernell v. *Southall Realty*, 416 U.S. 363 (1974)	22
Soriano v. *United States*, 352 U.S. 270 (1957)	24
Trammell v. *Callaway*, 415 F. Supp. 212 (D. Miss. 1976)	16
United States v. *Kubrick*, 444 U.S. 111 (1979)	24
United States v. *Pfitsch*, 256 U.S. 547 (1921)	9
United States v. *Sherwood*, 312 U.S. 584 (1941)	21, 23
United States v. *Testan*, 424 U.S. 392 (1976)	21
Whiteside v. *Gill*, 580 F.2d 134 (5th Cir. 1978)	19
Wickwire v. *Reinecke*, 275 U.S. 101 (1927)	24

STATUTES:

Age Discrimination in Employment Act of 1967, 81 Stat. 602, *as amended*, 29 U.S.C. §§ 621-634:	
§ 4(f), 29 U.S.C. § 623(f)	13
§ 7, 29 U.S.C. § 626	4, 14
§ 7(b), 29 U.S.C. § 626(b)	5, 6, 15
§ 7(c), 29 U.S.C. § 626(c)	2, 14, 15, 22
§ 7(e), 29 U.S.C. § 626(e)	16
§ 11(f), 29 U.S.C. § 630(f)	13
§ 12(a), 29 U.S.C. § 631(a)	13
§ 12(c), 29 U.S.C. § 631(c)	13
§ 12(d), 29 U.S.C. § 631(d)	13
§ 15, 29 U.S.C. § 633a	*passim*
§ 15(b), 29 U.S.C. § 633a(b)	11
§ 15(c), 29 U.S.C. § 633a(c)	*passim*
§ 15(d), 29 U.S.C. § 633a(d)	15
§ 15(f), 29 U.S.C. § 633a(f)	3, 12, 14
Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189	12
§ 4(a), 92 Stat. 190	22
§ 5(e), 92 Stat. 192	12
§ 5(f), 92 Stat. 192	15

INDEX OF CITATIONS—Continued

	Page
Civil Rights Act of 1964, 78 Stat. 253, *as amended*, 42 U.S.C. § 2000(e)	2, 3, 6, 7, 19
§ 706(g), 42 U.S.C. § 2000e-5(g)	6
§ 717, 42 U.S.C. § 2000e-16	7, 9
§ 717(c), 42 U.S.C. § 2000e-16(c)	15, 16
§ 717(d), 42 U.S.C. § 2000e-16(d)	6, 15
Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55	11
Portal to Portal Act of 1947, § 6, 61 Stat. 84, *as amended*, 29 U.S.C. § 255	16
Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. §§ 741-752	23
§ 742	8, 23
28 U.S.C.:	
§ 1346(a)	23, 24
§ 1346(b)	23, 24
§ 1491	24
§ 2401	16, 24
§ 2402	8, 23
§§ 2501-21	23, 24
§ 2674	24
LEGISLATIVE MATERIALS:	
H.R. REP. No. 92-238, 92nd Cong., 1st Sess. (1971)	10
H.R. REP. No. 93-913, 93rd Cong., 2d Sess. (1974)	18
H.R. REP. No. 95-527, Part I, 95th Cong., 1st Sess. (1977)	13, 14
H.R. CONF. REP. No. 95-950, 95th Cong., 2d Sess. (1978)	14, 15
S. REP. No. 92-415, 92nd Cong., 1st Sess. (1971)	11
S. REP. No. 95-690, 93rd Cong., 2d Sess. (1974)	11, 18
S. REP. No. 95-493, 95th Cong., 1st Sess. (1977)	13
123 CONG. REC. S17297 (daily ed. Oct. 19, 1977)	14
H.R. 5383, § 5(c)	13

INDEX OF CITATIONS—Continued

RULES AND REGULATIONS: Page

FED. R. CIV. P. 38 8
FED. R. CIV. P. 50 22
FED. R. CIV. P. 56 22
Code of Federal Regulations (1979):
29 C.F.R. §§ 1613.501-.521 11
Federal Register:
39 Fed. Reg. 24351 (1974) 11

MISCELLANEOUS:

Abernathy, *Sovereign Immunity in a Constitutional Government: The Federal Employment Discrimination Cases*, 10 HARV. CR-CLL REV. 322 (1975) 21
Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109 (1971) 7
Executive Order No. 11141, 29 Fed. Reg. 2477 (1964) 18
Executive Order No. 11478, 34 Fed. Reg. 12985 (1969), *as amended* 36 Fed. Reg. 7831 (1971).. 10
5 MOORE'S FEDERAL PRACTICE ¶ 38.31[2] (1980 ed.) 8
Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807, 92 Stat. 3781 (1978) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-242

EDWARD HIDALGO, SECRETARY OF THE NAVY,
Petitioner

v.

ALICE NAKSHIAN,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

AMICUS CURIAE BRIEF OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL-CIO) IN SUPPORT OF RESPONDENT

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 42, consent of the parties having been obtained, the American Federation of Government Employees files this Brief as *amicus curiae* in support of the Respondent.

INTEREST OF THE AMICUS CURIAE

The American Federation of Government Employees, AFL-CIO (AFGE) is an unincorporated association representing approximately 700,000 civilian employees of the federal government. AFGE is the largest labor organization of non-postal federal employees including the so-called blue collar, white collar and professional groups of employees located in nearly every major department and agency of the federal government.

In its capacity as exclusive bargaining representative, AFGE negotiates personnel policies, presents grievances and complaints including court actions, and carries on legislative activity to improve the welfare of the employees it represents. One of the subjects of these activities is equal employment opportunity. AFGE is committed to full opportunity for all employees of the federal government and opposes discrimination on the basis of age, race, sex, color, religion, national origin and handicap. Therefore, AFGE is keenly interested in the rights of federal employee litigants under the Age Discrimination in Employment Act. In addition, AFGE upholds the principle that in the area of equal employment opportunity the federal government as an employer bears no fewer obligations and responsibilities than do employers in the private and other public sectors.

SUMMARY OF ARGUMENT

Section 15 of the Age Discrimination in Employment Act of 1967 *as amended*, (ADEA), 29 U.S.C. § 633a, was correctly read by the court of appeals to provide for a right to trial by jury in actions brought by federal employees under that section.

Examination of the language of section 15(c) of the ADEA requires a conclusion that the grant of a right to trial by jury was made by Congress. Provision is made for "legal" as well as "equitable" relief. In *Lorillard* v. *Pons*, 434 U.S. 575 (1978) this Court apprehended the significance of Congress' use of the term "legal" in section 7(c) of the ADEA, 29 U.S.C. § 626(c), where it appears in the same context as it does in section 15(c). The Court noted the difference between this enforcement provision and that of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, *as amended*, 42 U.S.C. § 2000e, where no similar term of art is utilized. In fact, contrary to the Petitioner's assertions, comparison of sec-

tion 15 to its counterpart in Title VII suggests an intentional distinction between the two statutes in the provisions relating to relief. The emphasis placed upon the use of the word "legal" by the court of appeals is supported by congressional usage and by this Court's previous decisions not only in this, but other contexts. *Curtis* v. *Loether*, 415 U.S. 189 (1974).

In addition to the inclusion of the word "legal" in section 15, the court of appeals also correctly found significance in the grant of jurisdiction over federal employee ADEA actions to the district courts. This grant is particularly telling in light of Congress' authorization for legal relief. In the absence of a provision to the contrary, the grant of jurisdiction to a district court to sit as a court of law suggests a right to trial by jury.

There is nothing in the legislative history of either the original 1974 amendments to the ADEA, extending coverage to federal employees, or of the 1978 amendments, which suggests a congressional intent contrary to that which appears from the language of the statute.

The concerns which dictated Congress' approach in amending the ADEA to cover federal employees in much the same way it amended Title VII of the Civil Rights Act, relate to administrative, not judicial enforcement. As already noted, with respect to judicial enforcement the provisions of section 15(c) and its counterpart in Title VII are significantly dissimilar. As to the amendments made in 1978, Congress' preoccupation at that time was with reducing the incidence of mandatory retirement. In that regard, Congress went further in protecting federal employees than it did for others, by eliminating completely any upper age limit for coverage by the ADEA. To insure that this expanded protection would be effective, Congress included a provision adding subsection (f) to section 15, making it clear that no limitation in any other portion of the ADEA would apply to

section 15. Initiated completely apart from these amendments to section 15 was a change to section 7 of the ADEA, 29 U.S.C. § 626, making clear the right to trial by jury in suits brought pursuant to that section. The change was aimed at resolving a conflict among the circuit courts of appeal over whether a right to trial by jury existed under section 7. The omission of any comparable change to section 15 reflects only the specificity of the amendment and not any determination to deny jury trials in section 15 cases.

In any event, section 15 of the ADEA, prohibiting age discrimination in the federal government and prescribing the enforcement responsibilities and rights deriving from that prohibition, cannot be seen as existing in a vacuum. In order to determine what will "effectuate the purposes" of the ADEA, courts should not be barred from looking to other statutory provisions in order to determine Congress' intent with regard to the rights to be accorded in connection with civil actions brought by federal employees.

Statutes are to be interpreted in light of their purpose. Congress has made clear its view that in the area of equal employment opportunity the federal government, as an employer, is fully obliged to eradicate and remedy unlawful discrimination and is subject to the same duties as are private employers and other public employers. This Court is asked by Petitioner in this case to accept the position, contrary to this general view, that when sued under the ADEA, the federal government ought not to be subject to the same manner of judicial enforcement as other employers. Such a position cannot be credibly maintained.

There is no presumption against jury trials in actions against the United States and the court of appeals properly rejected such a proposition. The doctrine of sovereign immunity does not govern this question and a court is not bound to find an affirmative and unequivocal

grant of a right to trial by jury. Once immunity from suit has been waived by the federal government, as it clearly is in section 15(c) of the ADEA, a court approaches the question of the existence of a right to trial by jury as an ordinary one of statutory interpretation. It is true that Congress may condition a waiver of immunity but it would appear that where Congress has wanted to deny trial by jury as a condition for suit it has expressly done so. It was proper for the court of appeals, in the absence of a clear statutory provision proscribing trial by jury, to determine whether the statute expressly, or by fair implication, provides for such a right. The conclusion of the court of appeals that a congressional intention to confer a right to trial by jury in cases under section 15 of the ADEA may be inferred from the language of the statute is correct and should be affirmed.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY INTERPRETED SECTION 15 OF THE ADEA TO ACCORD A RIGHT TO TRIAL BY JURY.

A. The Language of Section 15 Creates a Right to Trial by Jury.

1. *Section 15(c) Provides for "Legal" as well as "Equitable" Relief.*

In *Lorillard* v. *Pons*, 434 U.S. 575 (1978) this Court, in deciding that private employees have a right to trial by jury when suing their employers under section 7(b) of the ADEA (29 U.S.C. § 626(b)), found it significant of Congress' intention that provision for "legal" as well as "equitable" relief was made. 434 U.S. at 583. Speaking for the Court, Justice Marshall recognized the word "legal" as a term of art connoting a proceeding in which a right to trial by jury is normally to be accorded. Congress was deemed to be cognizant of the meaning of the

word when including it in the provisions of the ADEA. *Id.* at 583. Particular note was taken of the absence of the same or any similar term in the remedial provisions of Title VII of the Civil Rights Act despite other strong resemblances between that statute and the ADEA. Justice Marshall stated in this regard:

> There are important similarities between the two statutes, to be sure, both in their aims—the elimination of discrimination from the workplace—and in their substantive provisions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII. But in deciding whether a statutory right to jury trial exists, it is the remedial and procedural provisions of the two laws that are crucial and there we find significant differences.
>
> Looking first to the statutory language defining the relief available, we note that Congress specifically provided for both "legal or equitable relief" in the ADEA, but did not authorize "legal" relief in so many words under Title VII.

434 U.S. at 584 (footnote omitted). Although the Court was comparing in particular section 7(b) of the ADEA (29 U.S.C. § 626(b)) and 42 U.S.C. § 2000e-5(g), which govern actions against non-federal employers, the same differences exist between section 15(c) of the ADEA and its counterpart in Title VII (section 717(d), 42 U.S.C. § 2000e-16(d)). Section 15(c) provides for "legal relief" whereas section 717(d) (incorporating § 2000e-5(g)) does not.

Upon the rationale that Title VII accords only equitable remedies, the majority of courts considering the issue have decided that there is no right to jury trial in Title VII cases.[1] Based on this precedent, Petitioner argues

---

[1] *Harmon* v. *May Broadcasting Co.*, 583 F.2d 410, 410-411 (8th Cir. 1978) (other cases cited showing that majority of circuits have denied jury trial); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 308 (6th Cir. 1975) (no jury trial under Title VII because section

that the similarities between section 15 of the ADEA and section 717 of Title VII suggest an intention to deny trial by jury in actions under section 15. Pet. Br. at 26. Petitioner fails to note, however, the significant differences in the respective provisions relating to relief discussed in *Lorillard* and cited above. Given the extent to which Congress drew on section 717 in writing section 15 of the ADEA, departures from Title VII must be viewed as intentional. As Justice Marshall remarked in the *Lorillard* decision, "to the extent petitioner correctly interprets congressional intent with respect to jury trials under Title VII, the very different remedial and procedural provisions under the ADEA suggest that Congress had a very different intent in mind in drafting the later law." 434 U.S. at 585 n. 14.[2] It is likely that, if Title VII contained the wording of the ADEA relative to relief available to an aggrieved employee, courts which have denied trial by jury in actions under that statute would have reached different results.[3]

Although this Court's decision in *Lorillard* rested on statutory and not constitutional grounds, 434 U.S. at 577, the importance placed upon the express provision for legal relief is consistent with *Curtis* v. *Loether*, 415 U.S. 189 (1974) decided a few years earlier. In *Curtis* this

---

706(g) does not authorize damages but only equitable remedies); *Brown* v. *Frito-Lay, Inc.*, 15 FEP Cases 1055, 1059 (D. Kan. 1976) ("the statute speaks of awarding equitable relief").

[2] The court of appeals in its decision in this case, while focusing on the express language of the statute did note in the legislative history evidence that Congress considered jury trials specifically appropriate in age discrimination cases. Pet. App. 12a-13a, n. 6 (citing remarks of Senator Kennedy).

[3] *See generally Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1266 (1971). ("The addition of a compensatory damage remedy [to Title VII] . . . would present legal issues constitutionally requiring a jury trial").

Court held that the Seventh Amendment of the Constitution applies to actions enforcing newly created statutory rights and remedies that are legal in nature. 415 U.S. at 194. The court of appeals' reliance in this case on the appearance of the words "legal relief" in section 15(c) is therefore well founded.[4]

2. *Section 15(c) Places Jurisdiction of Actions Brought Against the Federal Government in the District Courts.*

In addition to the provision for "legal relief", the court of appeals found import in the grant to the district courts of jurisdiction over actions brought pursuant to section 15(c). Pet. App. at 10a-11a.

Congress may confer jurisdiction of an action against the United States upon the Court of Claims, or upon a district court sitting as a court of law or equity, as a court of claims or as a court of admiralty. "Absent a provision as to the method of trial, a grant of jurisdiction to a district court as a court of law carries with it a right of jury trial." 5 MOORE'S FEDERAL PRACTICE ¶ 38.31[2], at 38-239 (1980 ed.). Courts of claims and courts of admiralty traditionally and by express rule conduct their proceedings without juries. 28 U.S.C. § 2402; 46 U.S.C. § 742; Fed. R. Civ. P. 38.

As has been indicated in the foregoing section, *see* p. 6, *infra*, with respect to suits against the United States under section 15(c) of the ADEA, district courts are specifically authorized to provide legal relief and, therefore, to sit as courts "of law". As a result, the grant

---

[4] *See also Franquez* v. *United States*, 604 F.2d 1239, 1243 n. 14 (9th Cir. 1979) (in determining whether jury trial proper in proceedings under 42 U.S.C. § 1424c, court placed significance on use of the terms "fair compensation" and "fair market value", words commonly used in condemnation proceedings where juries are traditional).

of jurisdiction to the district courts in such cases is significant. As the court of appeals notes in its decision, Pet. App. at 10a-11a, this Court has itself inferred a congressional intent to permit jury trials in an action against the federal government from the fact that jurisdiction is in the district courts. *United States* v. *Pfitsch*, 256 U.S. 547 (1921); *Law* v. *United States*, 266 U.S. 494 (1925).

B. Nothing in the Legislative History Reveals an Intent by Congress to Deny the Right to Jury Trial in Cases Brought Under Section 15 of the ADEA.

Petitioner has in a sense "placed the cart before the horse" in its brief to the Court. Before addressing the actual language of section 15 which the court of appeals found persuasive of the existence of a right to trial by jury, Petitioner argues extensively the legislative history of the ADEA and section 15, which it alleges precludes any inference that Congress intended to grant such a right. Of course, as Petitioner acknowledges, Pet. Br. at 16, the starting point in any task of statutory construction is the language of the act. This language, as we have argued in the preceding section, supports the inference drawn by the court of appeals. Even so, looking at the legislative history cited by Petitioner, we do not agree that it establishes an intention contrary to that reflected in the language of the ADEA itself.

1. *The 1974 Amendments.*

Petitioner argues that because, in amending the ADEA in 1974 to cover federal employees, Congress created a separate section 15, to a large extent modeled after section 717 of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e-16, Congress thereby demonstrated an intention to deny federal employees the right to jury trial. Pet. Br. at 25-26. But to the contrary, Congress created a separate section and looked to Title

VII in drafting it for reasons which shed no light whatever on the question of trial by jury.

When Congress decided to create a new section of the ADEA to cover federal employees, it was indeed following the same approach it used when amending Title VII. In both instances the motivation for this approach was preservation of existing administrative complaint procedures. Prior to the time Title VII was amended to cover federal employees, discrimination in federal employment was banned by Executive Order 11478, 34 Fed. Reg. 12985 (1969), *as amended* 36 Fed. Reg. 7831 (1971), *reprinted in* 42 U.S.C. § 2000e at 286, and the Civil Service Commission had in place administrative procedures for the acceptance and processing of complaints of discrimination by employees.

When Congress decided to include federal employees in Title VII, it was out of concern that the executive order program had been ineffectual,[5] and that relief in the courts was virtually impossible to obtain in the absence of a statutory authorization for suits by federal employees. H.R. REP. NO. 92-238, 92nd Cong., 1st Sess. 23-25 (1971), *reprinted in* [1972] U.S. CODE AD. & CONG. NEWS, 2137, 2157-60. The House passed legislation (H.R. 1746) that would have eliminated Civil Service Commission authority over equal employment matters and transferred federal employee administrative complaints to the Equal Employment Opportunity Commission (EEOC), the responsible agency for non-federal employee programs. *Id.* at 25. However, the final measure did not take that approach. Rather, the Senate Bill (S. 2515), which was substituted for the House version, retained program authority for federal employee discrimination complaints in the Civil Service Commission based apparently on a concern for the EEOC's workload and on a belief that

---

[5] *See Morton* v. *Mancari*, 417 U.S. 535, 547 (1974).

the Civil Service Commission was committed to doing a better job. S. REP. No. 92-415, 92nd Cong., 1st Sess. 12-16 (1971). Thus, section 717 as enacted, accommodated an already existing administrative framework for the handling of complaints of discrimination by federal employees and was aimed at improving but not eliminating this framework. Congress did insure a remedy in court, if these administrative procedures did not resolve or remedy unlawful practices.

When the ADEA was amended in 1974 to cover federal employees, once again accommodation of the existing administrative procedures was made and age discrimination complaints were simply engrafted to the existing equal employment program administered by the Civil Service Commission. 29 U.S.C. § 633a(b); 39 Fed. Reg. 24351 (1974), *reprinted in* 29 C.F.R. §§ 1613.501-.521. This is not surprising given that in the same 1974 legislation when Congress amended the Fair Labor Standards Act (FLSA) to cover federal employees it placed responsibility for administering the FLSA in this area with the Civil Service Commission rather than with the Department of Labor. Pub. L. No. 93-259, § 6, 88 Stat. 55 (1974), *codified in* 29 U.S.C. §§ 203(d), (e), (x), 204(f). This was in recognition of the pay authority already exercise by the Civil Service Commission. S. REP. No. 93-690, 93rd Cong., 2nd Sess. 23 (1974). Thus, in drafting a separate section of the ADEA for federal employees and placing federal ADEA enforcement with the Civil Service Commission, Congress was simply following a consistent pattern of deferring to existing administrative schemes.

The only possible conclusion from this legislative history is that the manner in which the ADEA was amended in 1974 to cover federal employees, i.e., by creation of a new, separate section 15, does nothing to elucidate Congress' intent on the question of jury trials in court actions

brought by such employees.[6] It is quite obvious that Congress was concerned with retaining and utilizing existing administrative procedures. With regard to judicial enforcement, the language of section 15 of the ADEA departed from section 717 of Title VII to a significant degree. *See*, p. 6, *infra*.

2. ***The 1978 Amendments.***

In 1978 Congress further amended the ADEA. In the legislation as it was finally passed (Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189), appear two provisions which Petitioner urges this Court to read together to find a definitive expression of Congress' intention to deny to litigants under section 15 a right to trial by jury. Pet. Br. at 26-29.

One of these provisions is an amendment to section 15 adding subsection (f).[7] This section was added in conjunction with the amendment to section 12 removing an age limit for federal employment. Congress' primary purpose in making the 1978 amendments was to address what Congress perceived to be the inequity of mandatory retirement imposed by employers, including the federal government, on workers who but for their age are able

---

[6] This is further illustrated by the fact that Reorganization Plan No. 1 of 1978, 43 F.R. 19807, 92 Stat. 3781 (1978), *reprinted in* 42 U.S.C. § 2000e-4, transferred to the EEOC administrative enforcement of the ADEA for *both* federal and non-federal sectors. Thus authority originally vested in the Civil Service Commission and the Department of Labor by the ADEA now rests with the same agency.

[7] Pub. L. No. 95-256, § 5(e), *codified in* 29 U.S.C. § 633a(f).

Section 15(f) states, "Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this Act, other than the provisions of section 12(b) of this Act and the provisions of this section."

and willing to work. H.R. REP. No. 95-527, Part I, 95th Cong., 1st Sess. 1 (1977); S. REP. No. 95-493, 95th Cong., 1st Sess. 1 (1977).

The House of Representatives initiated an amendment to lift entirely the upper age limit for federal employees covered by the ADEA. H.R. 5383, § 5(c); H.R. REP. No. 95-527 at 16. The House Report indicates that the Committee on Education and Labor was concerned that the newly expanded group of federal employees not be denied the full protection of the ADEA. In particular the Committee was concerned with provisions remaining in the ADEA which, in regard to the non-federal sector, preserve restrictions on upper age-limit employees. *Id.* at 11. The Committee enumerated two specific restrictive provisions of which it was wary, namely, section 12(a), 29 U.S.C. § 631(a), providing coverage of the ADEA to employees between the ages of forty and seventy, and section 4(f), 29 U.S.C. § 623(f), exempting bona fide retirement programs.[8] Examination of the Act in full indicates that there are possible others: section 11(f), 29 U.S.C. § 630(f), which exempts from the ADEA certain policy level employees; section 12(c), 29 U.S.C. § 631(c), which permits the mandatory retirement of employees between the ages of 65 and 70 who are in executive or high policymaking positions if they are entitled to immediate retirement benefits; and section 12(d), 29 U.S.C. § 631(d), which permits compulsory retirement of employees of institutions of higher education if they are between the ages of 65 and 70. The Committee also was concerned with court decisions holding that the ADEA had not superseded other federal statutes im-

[8] "Section 15 of the act which prohibits employment discrimination on account of age in Federal Government employment is complete in itself. *Restrictions and limitations* in other parts of the act, such as paragraph (a) of section 12 and paragraph (f) of section 4 do not apply to section 15" (emphasis added). H.R. REP. No. 95-527 at 11.

posing mandatory retirement ages. H.R. REP. No. 95-527 at 5.

To address the above concerns, therefore, in H.R. 5383 the Committee provided not only for the amendment of sections 12 and 15(a) to remove the upper age limit on those federal employees covered by the Act, but also for a new section 15(f) that was to make it clear that limitations in the rest of the provisions of the ADEA do not apply to section 15. H.R. REP. No. 95-527 at 11, 16.

The other provision of the 1978 amendments noted by Petitioner is one making an addition to section 7 of the ADEA (29 U.S.C. § 626). In the Senate version of H.R. 5383 was added an amendment by Senator Kennedy aimed, as the court of appeals notes in its decision, Pet. App. at 12a-13a, at resolving a conflict then existing in the circuit courts of appeal over the presence of a right to trial by jury under the ADEA. At that time all of the conflicting circuit court decisions involved suits brought against private employers under section 7. *Lorillard* v. *Pons*, then pending in this Court, also involved section 7. Senator Kennedy's amendment, which was adopted by the Senate, 123 CONG. REC. S17297 (daily ed. Oct. 19, 1977), and by the Conference Committee in modified form, H.R. CONF. REP. No. 95-950, 95th Cong., 2d Sess. 3 (1978), added to section 7 an express grant of the right to trial by jury. This is now codified in 29 U.S.C. § 626(c)(2).

There is no indication in the legislative history of the 1978 amendments that Congress considered denying jury trials in actions against the federal government. The two amendments discussed above (the addition of section 15(f) and the amendment to section 7) were not viewed as related. In fact, they became effective on different dates. Like the amendments to section 15(a) and 12(a) lifting the upper age limit for federal employees, and reflecting its relationship to those sections,

section 15(f) was given an effective date of September 30, 1978, six months beyond the date of enactment. Pub. L. No. 95-256 § 5(f), 92 Stat. 192.[9] On the other hand, the jury trial amendment to section 7 took effect for actions filed after the date of enactment.

C. Section 15 of the ADEA Does Not Exist in a Vacuum.

It should be apparent that section 15(c) authorizing "aggrieved" persons to file civil actions against the federal government will, given its brevity and relationship to the rest of the Act,[10] be the subject of future judicial interpretation as to the manner in which these actions are to be brought and as to the scope of relief which is available.

The predictable issues for judicial resolution include class action certification,[11] attorneys fees,[12] statute of limi-

---

[9] The six month delay in these provisions becoming effective was an addition of the Senate Conferees. H.R. CONF. REP. NO. 95-950, 95th Cong., 2d Sess., 10-11 (1978), *reprinted in* [1978] U.S. CODE CONG. & ADM. NEWS, 528, 532.

[10] In its entirety section 15(c) states: "Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act." 29 U.S.C. § 633a(c). Section 15(d) provides in part: "When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days notice of an intent to file such action". 29 U.S.C. § 633a(d). *Compare with* 29 U.S.C. §§ 626(b), (c), and 42 U.S.C. §§ 2000e-16(c), (d). Section 2000e-16(d) states: "The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder".

[11] *Moysey* v. *Andrus*, 481 F. Supp. 850 (D.D.C. 1979) (deciding that class actions may be certified under Rule 23; opt-in provision of the FLSA followed in private ADEA cases is not applicable).

[12] *DeFries* v. *Haarhues*, 488 F. Supp. 1037, 1044-5 (C.D. Ill. 1980) (rejecting the government's argument that neither attorneys fees nor costs are payable under section 15(c) since not expressly provided for, and due to the provisions of section 15(f)).

tations and notice requirements,[13] damages,[14] and exhaustion of administrative remedies.[15]

Interestingly, the federal government has taken conflicting positions in arguing these various issues. In some cases it has maintained that section 15 must be read as incorporating the enforcement procedures of the FLSA. On this basis it has argued for the dismissal of claims for compensatory damages (since liquidated damages are recoverable), and motions for class action certification under Rule 23 of the Federal Rules of Civil Procedures, *Moysey* v. *Andrus*, 481 F. Supp. at 852. In other cases the opposite position has been taken, i.e., that section 15 is completely separate from the rest of the ADEA. In this manner the federal government has opposed not only jury demands, as in this case, but also claims for attorneys fees and costs, *DeFries* v. *Haarhues*, 488 F. Supp. at 1044.

---

[13] Section 15 provides no time limit for filing a civil action following the receipt of a final administrative decision where an administrative complaint has been filed with the EEOC. In contrast, the Fair Labor Standards Act, whose statute of limitation (29 U.S.C. § 255) is incorporated by 29 U.S.C. § 626(e) into section 7 of the ADEA, requires an action to be brought within two years from the date the action accrued (three years if violation is wilful). Title VII, 42 U.S.C. § 2000e-16(c), requires a civil action to be filed within 30 days of a final decision of the EEOC or the agency. The general statute of liimtation for suits against the government is six years, 28 U.S.C. § 2401. At the present time, EEOC advises complainants to follow the FLSA provisions.

[14] *Braswell* v. *Kobelinski*, 428 F. Supp. 324, 325 n. 1 (D.D.C. 1976) (indicating dismissal of the plaintiff's claim for compensatory damages without explanation).

[15] *Compare Bunch* v. *United States*, 548 F.2d 336, 340 (9th Cir. 1977) (holding that plaintiff had to exhaust administrative remedies before filing civil action) *with Hall* v. *United States*, 436 F. Supp. 505, 508 (D. Minn. 1977) (no exhaustion of administrative remedies is required). *See also Trammell* v. *Callaway*, 415 F. Supp. 212, 216 (D. Miss. 1976) (dismissed action for failure to complete administrative procedure).

A considered reading of section 15 reveals that although the section is, to a large extent, discrete from the rest of the ADEA, there is no basis for proceeding as if it exists in a vacuum. Courts should be permitted to look beyond the section for guidance as to Congress' purpose with regard to enforcement actions against the federal government. Section 15(c) provides that relief is to be accorded such as *"will effectuate the purposes of this Act"* (emphasis added). "The Act" must refer to the entire ADEA since section 15 was not passed as a separate act but, indeed, as an amendment to the original ADEA. Thus, it should be possible for a court to determine in any particular instance whether, consistent with the motive with which Congress made section 15 distinct from the rest of the ADEA, it can be concluded that Congress also deemed certain measures provided elsewhere in the ADEA to be essential for the effectuation of the purposes of the Act.[16] Those purposes are the banning of discrimination on the basis of age in employment and the provision for full and effective remedies where such discrimination is found to have occurred.

D. Congress Intends, with Regard to Employment Discrimination, that the Federal Government be on the Same Footing as Other Public and Private Employers.

Statutes are to be construed "in the light of their purpose", *Haggar Co.* v. *Helvering*, 308 U.S. 389, 394 (1940). In amending the Age Discrimination in Employment Act (ADEA) to extend coverage to federal employees, Congress' purpose was to provide to such employees

---

[16] This was the approach taken by the court in *DeFries* v. *Haarhues*, 488 F. Supp. 1037, 1044-5 (C.D. Ill. 1980), to reject the defendant's argument that recovery of attorneys fees and costs could not be made under section 15(c). The court found by looking at the rest of the ADEA that Congress obviously believed such recovery necessary to effectuate the purposes of the Act.

the legal protections already enjoyed by private employees. To this end, Congress imposed upon the federal government the same obligations and liabilities as those borne by private and other public sector employers.[17] The Report of the House Committee on Education and Labor on H.R. 12435 states with regard to this amendment, "[t]he Committee expects that expanded coverage under the Age Discrimination in Employment law will remove discriminatory barriers against employment of older workers in government jobs at the federal, and local government levels, as it has and continues to do in private employment". H.R. REP. No. 93-913, 93rd Cong., 2d Sess. 40-41 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS, 2811, 2850. The report on the Senate version of the same Bill (S. 2747) clarifies that the original exclusion of federal employees from the ADEA did not reflect any desire to deny federal employees protection from age discrimination. S. REP. No. 93-690, 93rd Cong., 2d Sess. 55 (1974). In fact, prior even to the passage of the ADEA, President Lyndon Johnson declared that, in affording equal employment opportunities for older employees, the federal government would provide "maximum leadership". Exec. Order No. 11141, 29 Fed. Reg. 2477 (1964).

Accepting Petitioner's arguments in this case would require the Court to adopt the position that Congress intends the federal government to enjoy greater protection from the consequences of discriminatory policies and practices than non-federal employers. In view of the legislative history not only of the ADEA but of other equal

---

[17] "[T]he legislative history makes it clear that Congress intended the federal government to have both the same obligations and flexibility as do private employers." *Mason* v. *Lister*, 562 F.2d 343, 345 (5th Cir. 1977). *Accord, Bradley* v. *Kissinger*, 418 F. Supp. 64, 69 (D.D.C. 1976), 436 F. Supp. 134 (D.D.C. 1977) (three judge court), *rev'd on other grounds sub nom. Vance* v. *Bradley*, 440 U.S. 93, (1979) (district court concluded that comparable protections are created for federal employees as exist for nonfederal employees).

employment legislation, this position cannot be credibly maintained. Clearly, in extending the ADEA to cover federal employees, Congress was continuing the approach it took when similarly amending Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e. This Court, in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976) determined that in making those Title VII amendments Congress had as a principal goal to grant to federal employees the "full rights" available to private sector employees (at 841). *Accord*, *Morton* v. *Mancari*, 417 U.S. 535, 547 (1974) ("In general it may be said that the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government"). *See*, *Dothard* v. *Rawlinson*, 433 U.S. 321, 331-2 n. 14 (1977).[18]

II. THERE IS NO AUTOMATIC PRESUMPTION AGAINST JURY TRIALS IN CASES AGAINST THE UNITED STATES; THE COURT OF APPEALS CORRECTLY APPROACHED THE CASE AS ONE INVOLVING AN "ORDINARY QUESTION OF STATUTORY INTERPRETATION" AND ITS TASK AS THAT OF DETERMINING WHETHER THE STATUTE EXPRESSLY OR BY FAIR IMPLICATION PROVIDES FOR A TRIAL BY JURY.

Petitioner asks this Court to enunciate for the first time a principle that "the grant of a right to trial by jury in suits against the federal government, [must] like the consent to suit itself, be 'unequivocally expressed' ", Pet.

---

[18] Following this approach the lower courts have, in Title VII actions against the federal government, found directly applicable the burden of proof formulations of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *Whiteside* v. *Gill*, 580 F.2d 134, 138 (5th Cir. 1978); and of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), *Douglas* v. *Hampton*, 512 F.2d 976, 981 (D.C. Cir. 1975), both of which involved suits against private employers. *See also* *Barnes* v. *Costle*, 561 F.2d 983, 988 (D.C. Cir. 1977) and *Parks* v. *Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975).

Br. at 15. It is Petitioner's view that, whether by direct application or not, the doctrine of sovereign immunity must "inform the Court's decision in this case". Pet. Br. at 15-16 n. 7. The absence of authority cited for such a rule is notable.

The Court of Appeals correctly found Petitioner's argument to rest on a "serious misconception" about the scope of the doctrine of sovereign immunity and held that once immunity to suit is waived (which it unquestionably is here, by section 15(c) of the ADEA), in the absence of specific procedures or conditions attached to that waiver, it is for the courts to determine the type of trial intended by Congress, without entertainment of a presumption either for or against trial by jury. Pet. App. at 8a-9a. Finding no explicit provision on the latter subject in section 15 of the ADEA, the court proceeded to determine whether authorization of a trial by jury could be fairly implied from the statute. Pet. App. at 9a. At this stage of inquiry, the court of appeals considered the doctrine of sovereign immunity to have "drop[ped] out of the picture". Pet. App. 9a n. 4.[19]

Sovereign immunity protects the federal government from suit except where permission to sue is expressly granted. That is settled law. Although at its inception this doctrine may have been supported by what are now considered archaic notions of the sovereign's invincibility,

---

[19] Such an approach was taken by the 9th Circuit in the case of *Franquez* v. *United States*, 604 F.2d 1239 (1979) where the issue was the right to a trial by jury in a case brought under a statute governing the review of claims respecting land acquired by the United States government on Guam (42 U.S.C. § 1424c). The statute was silent on the question of jury trial and the Government argued, as it does here, that an express statutory authorization was required. The Court of Appeals rejected that argument and held that the district court had not exceeded its jurisdiction in granting a jury trial, once sovereign immunity was waived, based on what it felt was a fair implication of the statute (at 1243).

today the doctrine is maintained in the interests of protecting the government from undue interference with public funds and operations. Abernathy, *Sovereign Immunity in a Constitutional Government: The Federal Employment Discrimination Cases*, 10 HARV. CR-CLL REV. 322, 333 n. 61 (1975), citing *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). *See generally Edelman* v. *Jordan*, 415 U.S. 651 (1974). As a practical matter, the doctrine may simply express the separation of powers between the three branches of government, protecting the legislature from challenges to its law-making powers by the courts unless the legislature has expressly allowed it. Abernathy, *supra*, at 359-60. In any case, in its application, the doctrine is one that limits or describes the scope of a court's jurisdiction, *United States* v. *Sherwood*, 312 U.S. 584, 591 (1941), and the type of relief that can be sought, *United States* v. *Testan*, 424 U.S. 392, 403 (1976), in a suit against the federal government.

It is difficult to see in what manner the trial of factual issues by either judge or jury legitmately relates to the concerns that arise when the federal government is sued. A jury has no greater power to interfere with government monies or operations than a judge; nor does a jury represent any greater challenge to the legislature's law-making authority. Likewise, the presence of a jury does not expand the jurisdiction of a court nor enlarge the type or scope of relief that can be granted.

Petitioner argues that in the context of an age discrimination suit, Congress would be concerned that the participation of a jury might expand the federal government's potential liability due to a bias by jurors to regard the federal government as a "deep pocket",[20] and that this

[20] In the current economic situation when the public (and potential jurors) are aware of the existence of high government spending, the national debt and the impact of these phenomena on the

fact necessitates the same cautious judicial approach required when waivers of sovereign immunity are considered. Pet. Br. at 13-14.

But Petitioner fails to explain why, if indeed motivated by such a concern, Congress would not have similarly protected state and municipal governments from jury trials as well. Congress did not do that, however, and the 1978 amendment to 29 U.S.C. § 626(c), Pub. L. No. 95-256 § 4(a)(2), 92 Stat. 190, and the decision in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), unquestionably affirm the availability of a jury trial in suits against these public employers.

The Petitioner's arguments would also lead one to believe that a judge, in an ADEA suit, is without power to grant a motion for summary judgment where there are no real issues of fact, FED. R. CIV. P. 56, or for judgment not withstanding a verdict, where the jury's award is unreasonable, FED. R. CIV. P. 50(b). Of course, this is not the case. Petitioner's argument that requiring trial to the court without a jury "conserves the public fisc", Pet. Br. at 15, is at best pure speculation.[21]

---

economy in general and on them as taxpayers, there may in fact be no basis upon which to project a "deep pocket" mentality among jurors. In general, federal employees appear not to enjoy the sympathy of the public at the present time.

[21] In its Petition for a Writ of Certiorari, Petitioner also argued that jury trials should be cautiously accorded because of the impact on the courts' calendars due to the time required to try such cases. In the case of *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974) this Court faced a similar argument when the issue was the right to jury trial in landlord-tenant cases in the District of Columbia. The Court's response was to "reject the notion that there is some necessary inconsistency between the desire for speedy justice and the right to a jury trial" (at 384) and to state further that, "[s]ome delay . . . is inherent in any fair-minded system of justice" (at 385).

There is no question that in passing section 15 of the ADEA and thereby authorizing suits against the federal government, Congress had the power to impose, and could have imposed, restrictions or conditions on its consent to suit. Congress has had no difficulty in making such conditions and limitations quite explicit in other statutes. *See* 28 U.S.C. § 2402 (providing no jury trials in actions brought under the Federal Tort Claims Act and Tucker Act, 28 U.S.C. §§ 1346(a)(2), (b)); 28 U.S.C. §§ 2501-21 (prescribing procedures for the Court of Claims); and 46 U.S.C. §§ 742-45 (setting rules governing suits in admiralty against the United States including a provision for "nonjury proceedings" in § 742).

From this basic proposition, that Congress may condition its consent to suit, Petitioner would have the Court *presume* that Congress has imposed a condition when none is clearly provided in the statute. Such an argument is not supported by the cases Petitioner cites. *McElrath* v. *United States*, 102 U.S. 426 (1880) merely affirmed that Congress could permissibly condition a suit in the Court of Claims on the absence of a trial by jury, as it could in other ways prescribe the forms of pleading and rules of practice even where the government-defendant might assert counterclaims against the plaintiff. But as already noted, Congress explicitly set the condition of non-jury trial in what is now 28 U.S.C. § 2402. *United States* v. *Sherwood*, 312 U.S. 584 (1941) held that in giving concurrent jurisdiction over claims against the government to the district courts as well as the Court of Claims, Congress did not expand the waiver of sovereign immunity made by the Tucker Act. The Court incidentally cited the holding of *McElrath*. 312 U.S. at 587.

Other cases cited by Petitioner for the proposition that limitations and conditions on the Government's consent to suit are to be strictly construed, Pet. Br. at 15, likewise involve express limitations, in these instances, time limits

for filing suits under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), (*United States* v. *Kubrick*, 444 U.S. 111 (1979)), and in the Court of Claims, 28 U.S.C. § 2501 (*Soriano* v. *United States*, 352 U.S. 270 (1957)).

Petitioner seems not to appreciate the incongruity of basing a rule requiring an affirmative provision for jury trial on instances where Congress has, rather, affirmatively *denied* jury trial. It seems significant that Congress felt it particularly necessary to provide an express denial with regard to the Tucker Act and the Federal Tort Claims Act, both of which, like section 15 of the ADEA, permit recovery against the United States of legal forms of relief.[22] Contrary to what Petitioner argues, it may be more appropriate to conclude that when Congress has waived its immunity from suit for actions where legal relief is recoverable and thus the right to trial by jury would suggest itself, it has deemed it necessary to make express any intention that cases are to be tried by the courts alone.[23]

In summary, in the absence of a provision in section 15 of the ADEA concerning the right to trial by jury, the Court of Appeals was correct in rejecting any presumption against such a right and determining Congress' intent from a fair implication or inference from the statute. *Wickwire* v. *Reinecke*, 275 U.S. 101, 105 (1927) (dictum).

---

[22] 28 U.S.C. §§ 1491 and 1346(a)(2) give the courts jurisdiction to award "liquidated and unliquidated damages" in contract and non-tort actions. 28 U.S.C. §§ 2674 and 1346(b) make the United States liable for torts in the same manner as private individuals and specifically authorize the award of compensatory money damages.

[23] *See also Chandler* v. *Roudebush*, 425 U.S. 840, 862 n. 37 (1976) where this Court noted that although a trial *de novo* will not be presumed in suits brought following administrative procedures, in most instances where Congress does not intend for a trial *de novo* it so indicates by the use of appropriate terms of art.

CONCLUSION

For the reasons stated the judgment of the court of appeals should be affirmed.

Respectfully submitted,

MARY E. JACKSTEIT
Staff Counsel
American Federation of
Government Employees
(AFL-CIO)
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005

JAMES R. ROSA
General Counsel

ON FILE
MAR 9 1981

No. 80-242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDWARD HIDALGO,
SECRETARY OF THE NAVY, *Petitioner,*
v.
ALICE NAKSHIAN, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE AS AMICI CURIAE AND BRIEF AMICI CURIAE

FOR HON. CLAUDE PEPPER, HON. GERALDINE A. FERRARO, HON. TOM LANTOS, HON. BRUCE F. VENTO, HON. THOMAS J. DOWNEY, HON. MARY ROSE OAKAR, HON. RON WYDEN, HON. JOHN L. BURTON, HON. HENRY A. WAXMAN, HON. WILLIAM RATCHFORD, HON. JAMES M. JEFFORDS, HON. BARNEY FRANK, HON. EDWARD R. ROYBAL, MEMBERS OF CONGRESS AS AMICI CURIAE

CLAUDE PEPPER
CHARLES H. EDWARDS, III
U.S. HOUSE OF REPRESENTATIVES
Washington, D.C. 20515

EDWARD F. HOWARD
NATIONAL COUNCIL ON THE AGING
1828 L Street, N.W.
Washington, D.C. 20036
(202) 223-6250

Attorney for Amici Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1980
NO. 80-242

EDWARD HIDALGO,
SECRETARY OF THE NAVY, PETITIONER

v.

ALICE NAKSHIAN

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF HON. CLAUDE PEPPER, HON. GERALDINE A. FERRARO, HON. TOM LANTOS, HON. BRUCE F. VENTO, HON. THOMAS J. DOWNEY, HON. MARY ROSE OAKAR, HON. RON WYDEN, HON. JOHN L. BURTON, HON. HENRY A. WAXMAN, HON. WILLIAM R. RATCHFORD, HON. JAMES M. JEFFORDS, HON. BARNEY FRANK, HON. EDWARD R. ROYBAL FOR LEAVE TO FILE BRIEF AMICI CURIAE

MEMBERS OF CONGRESS AS AMICI CURIAE

Pursuant to Rule 42(3) of the Rules of this Court, Hon. Claude Pepper, Hon. Geraldine A. Ferraro, Hon. Tom Lantos, Hon. Bruce F. Vento, Hon. Thomas J. Downey, Hon. Mary Rose Oakar, Hon. Ron Wyden, Hon. John L. Burton, Hon. Henry A. Waxman, Hon. William R. Ratchford, Hon. James M. Jeffords, Hon. Barney Frank, Hon. Edward R. Roybal respectfully move the Court for leave to file a brief amici curiae in the above entitled case. Counsel for the appellant has denied movants' request to file brief of amici curiae; the appellee has granted his consent.

INTEREST OF AMICI

Amici are members of Congress with a unique interest in the fairness and efficiency of the Federal Government. Amici are also members of the Select Committee on Aging which has been mandated by the House of Representatives to study and review the problems of older Americans, including the problems of income maintenance and employment.

Representative Claude Pepper, in addition to chairing the Committee on Aging, was the principal sponsor and co-manager for floor consideration of the bill which became the Age Discrimination in Employment Act (ADEA) Amendments of 1978, Pub. L. 95-256, 92 stat. 189.

Amici as members of Congress have day-to-day experience in the process of legislation: discerning problems with legislative solutions, developing legislation to ameliorate such problems, and

obtaining the prerequisite votes to enact the necessary legislation. From this perspective, they can uniquely address the legislative intent underlying the Acts of Congress discussed in appellant's brief. Moreover, amici are singularly placed to address the broader interest of persons affected by age discrimination in general, issues regarding which are raised by the instant appeal.

It is to bring this unique perspective in addressing the issues raised herein that has prompted amici to file this motion seeking leave to file its amici curiae brief.

Amici respectfully request the leave of this Court to file a brief amici curiae presenting their views of the important issues raised herein.

Respectfully Submitted,

Claude Pepper
Charles H. Edwards, III
Select Committee on Aging
U.S. House of Representatives
Washington, D.C. 20515

Edward F. Howard
National Council on the Aging
1828 L Street, N.W.
Washington, D.C. 20036
(202)223-6250

Attorney for Amici Curiae

March 10, 1981

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1980
NO. 80-242

EDWARD HIDALGO,
SECRETARY OF THE NAVY, Petitioner

v.

ALICE NAKSHIAN

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR HON. CLAUDE PEPPER, HON. GERALDINE A. FERRARO, HON. TOM LANTOS, HON. BRUCE F. VENTO, HON. THOMAS J. DOWNEY, HON. MARY ROSE OAKAR, HON. RON WYDEN, HON. JOHN L. BURTON, HON. HENRY A. WAXMAN, HON. WILLIAM R. RATCHFORD, HON. JAMES M. JEFFORDS, HON. BARNEY FRANK, HON. EDWARD R. ROYBAL

MEMBERS OF CONGRESS AS AMICI CURIAE

PRELIMINARY STATEMENT

In accordance with Rule 42 of the Rules of this Court, this brief amici curiae is filed in support of the position of appellee, pursuant to a timely motion for leave to file such brief.

TABLE OF CONTENTS

		PAGE
	Table of Authorities	ii
I.	Interest of Amici Curiae . . .	1
II.	Summary of Argument	3
III.	Argument	5
	1. Congress Intended to Accord Federal Employees the Right to Jury Trial in Suits Brought Under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq	5
	A. The Language of the Act Indicates that Jury Trial was Contemplated	5
	B. The Evolution and Structure of the Act Support a Right to Jury Trial for Federal Employees.	14
	C. Congressional Statements Confirm the Intention to Accord Federal Sector Employees Aggrieved by Age Discrimination the Right to Trial by Jury. .	27
V.	Conclusion	31

TABLE OF AUTHORITIES

CASES: PAGE

Crouch v. United States,
8 F. 2d 435 (4th Cir. 1925) 11

Curtis v. Loether,
415 U.S. 189 (1974) 6

Franquez v. U.S.,
604 F. 2d 1239 (9th Cir. 1979) . . 13

Galloway v. United States,
319 U.S. 372 (1943) 7

Harris v. United States Dept.
of Treasury, 489 F. Supp. 476
(D.N. Ill. 1980) 17, 26

Hutto v. Finney,
437 U.S. 678 (1978) 13

Law v. United States,
266 U.S. 494 (1925) 11

Lorillard v. Pons,
434 U.S. 575 (1978) . . . . . passim

Moysey v. Andrus,
481 F. Supp. 850 (D.D.C. 1979). . . 27

Nakshian v. Claytor,
628 F. 2d 59 (D.C. Cir. 1980). . . 3, 10

United States v. McGovern,
299 F. 302 (9th Cir. 1924). 11

United States v. Pfitsch,
256 U.S. 547 (1921) 11

STATUTES, RULES and REGULATIONS:

Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. . . passim

Section 4(f), 29 U.S.C. § 623(f) . . 23
Section 7(b), 29 U.S.C. § 626(b) . . 15, 24
Section 7(c), 29 U.S.C. § 626(c) . . passim
Section 7(d), 29 U.S.C. § 626(d) . . 15
Section 12, 29 U.S.C. § 631 14
Section 15, 29 U.S.C. § 633a . . 15, 16, 22
Section 15(b), 29 U.S.C. § 633a(b) . 15
Section 15(c), 29 U.S.C. § 633a(c) . passim
Section 15(f), 29 U.S.C. § 633a(f) . passim

Fair Labor Standards Act, 29 U.S.C. § 201 et seq . . . 15, 17, 24, 25

Reorganization Plan No. 1 of 1978, Section 2. 16

Pub. L. No. 95256, 92 Stat. 189 (1978) 8

Federal Rule of Civil Procedure 23 . 25

MISCELLANEOUS

123 Cong. Rec. 34317-34318
(October 19, 1977) 9

125 Cong. Rec. E 4258
(daily ed. September 5, 1979). . . . 28

127 Cong. Rec. E 81 (daily ed.
January 19, 1981). 31

House Rule X, cl. 6 (g) (1979) . . . 1
4
H.R. 4472, 96th Cong.,
1st Sess. (1979). 22, 30

H.R. 935, 97th Cong.,
1st Sess. (1981) 22, 30

H.R. Rep. No. 95-527,
95th Cong., 1st Sess. (1977) 23

H.R. Rep. No. 95-950,
95th Cong., 2d Sess. (1978) . 8, 10, 25

In the Matter of Equal Employment
Opportunity Commission-Administrative
Payment of Attorneys Fees, B-193144
(U.S. Comp. Gen., September 15, 1980). 26

5 J. Moore, Federal Practice,
¶38.32 at 236. 12

9 Wright and Miller,

Federal Practice & Procedure, § 2314 .12

I. INTEREST OF THE AMICI CURIAE

The amici curiae consist of Honorable Claude Pepper, Chairman of the Select Committee on Aging of the United States House of Representatives, and other members of that committee. As members of the House Select Committee on Aging, amici are responsible for the "continuing comprehensive study and review of the problems of the older American." House Rule X, cl. 6 (g) (1979). Age discrimination in employment is a pervasive problem and the Committee regards it as essential that the law prohibiting such discrimination, as amended by 1978 legislation the Committee played a key role in developing, be interpreted correctly so as to give effect to congressional intent regarding appropriate enforcement mechanisms.

In the present case, a dispute has arisen over whether Congress intended Fed-

eral employees to have the right to a jury trial in suits brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (ADEA). There is nothing in the language of the statute nor in the legislative history that indicates that Congress thought that federal employees should be denied a jury trial. To so interpret the provisions of the ADEA would undermine the intent of Congress to protect all employees covered by the Act against age discrimination in a comparable manner. The House Select Committee on Aging has a continuing oversight role regarding the need for programs to assist older Americans and the effectiveness of existing programs. The ADEA is a basic charter protecting all employees from discrimination based on age. The committee is deeply concerned about interpretations of that Act which have the effect of di-

luting the rights and remedies available to a large segment of persons who may wish to utilize it to vindicate their rights, namely, federal employees.

II. SUMMARY OF ARGUMENT

The guarantee of a right to jury trial to federal employees was intended by Congress when it originally brought these workers under the coverage of this statute. The interpretation of the Congress' intent has been accurately articulated and presented by the U.S. Court of Appeals in Nakshian v. Claytor, 628 F. 2d 59 (D.C. Cir. 1980).

The ADEA, as amended, provides that aggrieved federal employees may bring a civil action "in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes" of the Act. 29 U.S.C. § 633a(c) (1976). The use of such lan-

guage indicates that jury trials were contemplated when the Act was extended to the Federal sector. Identical reasoning led this Court in Lorillard v. Pons, 434 U.S. 575 (1978), to find a right to jury trial for private employees existed under the Act.

To deny federal employees the right to jury trial would subvert the clear intention of Congress to protect federal employees against age discrimination in at least as effective a manner as private employees. Jury trial was recognized as an important procedural protection in the ADEA in general. When court cases made the law uncertain with respect to a private employee's right to jury trial under the ADEA, Congress, in 1978, made such a right explicit in order to clarify its original intent. This Court confirmed that intent in Lorillard prior

to final enactment of the 1978 amendments. It now has the opportunity to reconfirm congressional intent with respect to a class of comparable beneficiaries of the ADEA--federal employees.

III. ARGUMENT

1. Congress Intended to Accord Federal Employees the Right to Jury Trial in Suits Brought Under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq.

A. The Language of the Act Indicates that Jury Trial was Contemplated.

Section 15(c) of the ADEA, 29 U.S.C. § 633a(c) (1976), provides that:

> Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter. (Emphasis supplied.)

This provision is virtually identical to that part of the Act which governs civil actions by non-federal sector employees. Section 7(c), 29 U.S.C.

§ 626(c), provides that aggrieved persons may bring "a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter. . . . " This Court in Lorillard v. Pons, 434 U.S. 575 (1978), held that the use of the term of art "legal . . . relief" in section 7(c) indicates that Congress intended for it to carry its usual meaning, namely, that in cases where legal relief is available and legal rights are determined, the right to jury trial is preserved.

The same reasoning applies to the identical usage of the term in Section 15 (c) of the Act. The fact that the Seventh Amendment has been held to be the source of the right to jury trial in cases involving "legal" relief, Curtis v. Loether, 415 U.S. 189, 195 (1974),

and that, concededly, the Seventh Amendment does not itself guarantee a right to jury trial in suits against the United States, Galloway v. United States, 319 U.S 372 (1943), does not undermine this conclusion. This Court in Lorillard did not decide the constitutional issue of the Seventh Amendment's applicability in ADEA suits. 434 U.S. at 577. It instead noted the use of the phrase "legal relief" and the fact that Congress employed the term against the backdrop of its settled meaning and held that Congress "knew the significance of the term 'legal'" and intended for it to mean that jury trial was available in ADEA suits. 434 U.S. at 583.

The inference from the use of the language "legal relief" in Section 15(c) is even stronger in the case of federal employees. The ADEA provisions for federal sector complaints and lawsuits

were amended in 1978, with conference committee consideration and final enactment occurring after Lorillard was decided. See, Pub. L. No. 95-256, 92 Stat. 189 (1978); H. Rept. No. 95-950, 95th Cong., 2d Sess. (1978). Nevertheless, the provision for "legal relief" for federal employees was retained. Thus, the conclusion is almost irresistible that, having just been informed by the Court that provision for "legal relief" meant jury trial, Congress intended for that term to have its settled meaning when it used it in section 15(c).

This inference is not inconsistent with Congress specifically providing for jury trial for private employees in the 1978 amendments. That provision was first added on the Senate floor before Lorillard was decided. Its sponsor, Senator Kennedy, noted the split in the

circuits regarding the issue and offered the amendment to confirm Congressional intent and clarify the issue. 1/

1/ See, 123 Cong. Rec. 34317-34318 (October 19, 1977) (remarks of Senator Kennedy). Senator Kennedy's explanation for the desirability of the amendment applies to federal employee suits as well as those of private victims of discrimination:

> [J]uries are more likely to be open to the issues which have been raised by the plaintiffs. Sometimes, a judge may be slightly callous, perhaps because he himself, is protected by life tenure, or because he is somewhat removed from the usual employeremployee relationship. The jury may be more neutral in such circumstances.
>
> It does seem to me that when a particular plaintiff in an age discrimination case feels aggrieved, if he desires . . . a jury trial, that it would be important not to deny him that possibility.

Nothing in this legislative history indicates an intention to distinguish federal employee rights from those of private employees by the enactment of the jury trial provision.

The conference committee considered the bill after Lorillard and added a provision for jury trials in actions for liquidated damages, a question left open by the Court. H. Rept, 95-950, at 13-14; 434 U.S. at 577 n. 2. The court below correctly described the significance of this sequence of events:

> Thus, what we see is Congress reiterating its belief in the appropriateness of jury trials in ADEA actions and acting to confirm the right whenever doubt appeared first when there was conflict among the circuits on the jury trial issue, and later to resolve the question left open by Lorillard. The legislative history of the amendment speaks only in terms of confirming the right to jury trials in age discrimination cases. No attempt was made to draw a distinction between public and private employers. That only Section 7(c) was amended is easily explained by the fact that the cases which prompted congressional action were brought against private employers. 628 F. 2d at 65. (Emphasis supplied).

Section 15(c) contains another indication that the right to jury trial was intended to apply in federal sector ADEA suits. Jurisdiction to award legal and equitable relief is vested in any "Federal district court of competent jurisdiction." 29 U.S.C. § 633a(c) (1976). Congress thus chose the district courts to hear federal employee suits for legal relief. It has been held that the vesting of jurisdiction in the district court as opposed to, for instance, the Court of Claims, supports the inference that jury trial is available. Law v. United States, 266 U.S. 494, 496 (1925); United States v. Pfitsch, 256 U.S. 547 (1921); see also, Crouch v. United States, 8 F. 2d 435 (4th Cir. 1925); United States v. McGovern, 299 F. 302 (9th Cir. 1924). Congress obviously

may vest jurisdiction over actions against the United States in the court of its choice. "And the particular grant of jurisdiction will determine the method of trial, court or jury, in the absence of some express provision dealing with the method of trial. Thus, absent a provision as to the method of trial, a grant of jurisdiction to a district court as a court of law carries with it a right of jury trial." 5 J. Moore, Federal Practice, ¶ 38.32[2] at 236; see also 9 Wright and Miller, Federal Practice and Procedure, § 2314.

Thus, the language of the ADEA and the legislative background of the 1978 amendments confirm that federal employees enjoy the right to trial by jury in age discrimination suits against their government employers. The question is one of statutory interpretation and

drawing inferences from the use of language which has a settled meaning. 2/

2/ It is argued that in suits against the government there must be an explicit provision of the right to jury trial. See, Petition for A Writ of Certiorari, at 4; Reply Memorandum for the Petitioner, at 2, and Brief for Petitioner, at 4-5, 15.

However, such an argument, in effect, posits two doctrines of sovereign immunity -- immunity from suit and immunity from jury trial. Clearly, the former requires an explicit waiver. There is no additional requirement of explicitness with respect to the latter. The ADEA specifically abrogates sovereign immunity and permits suits against the government. Whether jury trial is a component of such suits is merely a question of statutory interpretation. See, Franquez v. U.S., 604 F. 2d 1239, 1242 (9th Cir. 1979); cf., Hutto v. Finney, 437 U.S. 678, 695-698 (1978) (Court did not require explicit waiver of State's Eleventh Amendment immunity in upholding the assessment of attorneys' fees against the State of Arkansas pursuant to the Civil Rights Attorneys' Fee Award Act of 1976).

Section 15(c) of the ADEA and the legislative background of the amendments of 1978 make clear that Congress had no intention of depriving federal employees of a significant right accorded all others under the ADEA.

B. The Evolution and Structure of the Act Support a Right to Jury Trial For Federal Employees

The general thrust and development of the ADEA demonstrates that the procedural rights of employees in the private and the federal sectors are to be comparable.

The Act, as passed in 1967, protected against age discrimination only those private employees between forty and sixty-five years old. 29 U.S.C. § 631. The original enforcement provision in 29 U.S.C. § 626 (c), authorized an aggrieved private employee to bring a civil action in any court of competent jurisdiction

for legal or equitable relief. Before beginning such action, the employee had to give notice to the Secretary of Labor of his or her intent to sue within the 180 days after the occurrence of the allegedly discriminatory acts. 29 U.S.C. § 626(d).

The remedial relief provision in 29 U.S.C. § 626(b) borrowed from the procedural and remedial scheme of the Fair Labor Standards Act (FLSA). It states:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in section 211(b), 216 (except for subsection (a) thereof), and 217 [of Title 29 of the Fair Labor Standards Act] and subsection (c) of this section . . .

In 1974, Congress amended the ADEA by enacting § 15, 29 U.S.C. § 633a, thus extending the coverage of the Act to employees of the Federal Government. 29 U.S.C. § 633a(b) and (c) are the remedi-

al relief and enforcement provisions governing federal employees. Together they provide that a lawsuit may be commenced in any federal district court after an employee has exhausted his or her administrative remedies by either seeking administrative relief from the Civil Service Commission (CSC) or filing a timely notice of intent to sue with the Commission. Since the enactment of the 1978 Reorganization Plan No 1, the age discrimination responsibilities of the CSC with respect to federal employees have been transferred from it to the Equal Employment Opportunity Commission (EEOC). See Section 2 of the 1978 Reorganization Plan No. 1, 43 Fed. Reg. 19307 (Feb. 13, 1978).

29 U.S.C. § 633a does not refer explicitly to the remedial provisions of the FLSA. Because § 633a does not provide that a different remedial scheme is

to apply to federal employees, it has become accepted generally that the FLSA procedural rights and remedies are also applicable to the federal sector. 3/

3/ Recently, in Harris v. United States Dept. of Treasury, 489 F. Supp. 476, 478 (D.N. Ill. 1980), the court, echoing the Court of Appeals in this case, wrote of the congressional decision to include federal employees within the ADEA:

> In extending coverage to government employees, there is no indication that Congress intended to distinguish between the procedures available to private and public employees. Rather Congress hoped that the expanded coverage would "remove discriminatory barriers against employment of older workers in government jobs at the federal and local government levels as it has and continues to do in private employment." H.R. Rep. No. 93-913, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Admin. News at 2350 (emphasis supplied). Thus, the purpose of the amendment was to

"Continued"

In 1978, Congress again amended the ADEA and extended the Act's coverage to seventy years of age for a private sector employee and removed entirely any upper-age limit for a federal worker. The amendments also contained several other substantive and procedural changes to the law. See especially § 7(c)(2), 29 U.S.C. § 626(c)(2), and § 15(f), 29 U.S.C. § 633a (f).

29 U.S.C. § 626(c)(2), applying only to actions begun under 29 U.S.C. § 626(c)(1), relates to suits brought by private employees and provides, in pertinent part, that a private employee who brings a civil action against his or her employer (sub-

---

"Continued"

provide government workers with protection similar to that available to private employees.

ject to the limitation that this right to sue ends when the Secretary of Labor steps in and commences an action on his or her behalf) is entitled to a jury trial. Section 15(f), 29 U.S.C. § 633a(f), also added in 1978, provides, with respect to the federal sector:

> Any personnel action of any department, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of the Act, other than the provisions of section 12(b) [establishing 40 years as the lower age limit beyond which employees would be denied protection under the ADEA] and the provisions of this section.

These provisions must be examined closely because they have been the source of the conflicting interpretations of the rights of federal employees under the Act. Furthermore, they cannot be construed in isolation but must be considered in light

of the pattern of development of the Act as a whole and the congressional purpose in insuring that all workers are afforded comparable protection from age discrimination.

29 U.S.C. § 626(c)(2) expressly provides for a right to jury trial for private employees covered by the Act. In introducing the amendment, Senator Kennedy was responding to a conflict which had developed in the courts concerning the availability of jury trial under the ADEA. 4/ The question of the right of federal employees to jury trials, however, had not been the subject of challenge, and there is no indication that by providing specifically for private employee jury trials Con-

---

4/ See, part 1A of the argument, supra pp. 8-9 for a description of the sequence of events surrounding the enactment of this amendment.

gress thereby intended to exclude federal employees from such a right.

Senator Kennedy spoke broadly of the benefits of jury trial and indicated the importance of the right to jury trial to all victims of age discrimination in employment. Jury trials were favored for reasons relating to perceptions of how judges and juries might render different decisions in age cases and not for reasons relating to distinctions between private and federal employees. 5/ The significance of Senator Kennedy's remarks -- and the legislative history of the provision as a whole -- is not the identity of the plaintiffs for whom the amendment was enacted, but the recognition that the amendment was designed to clarify the original intent of the Act.

5/ See, note 1, supra.

The present conflict over federal employees' right to jury trial is prompting a comparable move to amend the Act to clarify original congressional intent. 6/ This Court's affirmance of the decision below will make this second round of clarifying amendments unneccessary.

Section 15(f), 29 U.S.C. § 633a(f), also added in 1978, provides:

> Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

The provision on its face relates to the actions of federal employers, the entities "referred to in subsection (a) of this section ... ." 29 U.S.C. § 633a(a). The language and purpose of §

6/ See, H.R. 935, 97th Cong., 1st Sess. (1981); H.R. 4472, 96th Cong., 1st Sess. (1979).

15(f) make clear that it was intended to establish different substantive rights and obligations of federal employers in some situations. For example, 29 U.S.C. § 623 provides for certain defenses that private employers may assert but which are not available to public employers as a result of § 15(f).

The legislative history also focuses solely on the federal employer. The only statement of legislative intent regarding §15(f) explains that "restrictions and limitations in other parts of the Act, such as [§12(a), 29 U.S.C. § 631(a), which establishes 70 years as the upper age limit beyond which private employees would be denied protection] and [§4(f), 29 U.S.C. § 623(f), which authorizes several defenses available to private employers] do not apply to section 15." H. Rept. No. 95-527, 95th Cong., 1st

Sess. 111 (1977). Thus, § 633a(f) applies only to the government as employer, and in no way reflects an intent on the part of the Congress that federal employees be denied rights accorded other employees under the Act or that the powers of the government or the court, as enforcers of the procedural aspects of the ADEA, should be altered.

A contrary interpretation of § 633a (f) would lead to such illogical results as the following: 1) that federal employees would not be entitled to liquidated damages even if their employer was discriminating against them in a wilful manner (see, 29 U.S.C. § 626(b)); 2) that the district court and the administrative agency responsible for handling complaints would lack the authority to award attorney's fees (see, 29 U.S.C. § 216 (b)); and 3) that while private employees would be required to file

written consents with the court in order to bring a class action ("opt-in"), federal employees would be permitted to bring a FRCP 23 "opt-out" class action (see, 29 U.S.C. § 216(b)). Congress did not intend such differing procedural treatment of federal and private sector employees. Furthermore, to so discriminate between federal and private victims of age discrimination with respect to the availability of liquidated damages and attorneys' fees is not consistent with the congressional intent and policy to provide "increased protection for federal ... employees." H. Rept. No. 95-950, 95th Cong., 2d Sess. 112 (1978) (emphasis supplied).

This interpretation of §15(f) is the logical one and is most consistent with the spirit of the ADEA. It is the construction of the Act which has been

adopted by courts 7/ and the United States Comptroller General, 8/ and has

---

7/ See, Harris v. United States Dept. of Treasury, 489 F. Supp. 476 (N.D. Ill. 1980) (federal employees have the right to jury trial).

8/ In the Matter of Equal Employment Opportunity Commission - Administrative Payment of Attorneys Fees, B - 193144 (U.S. Comp. Gen., Sept. 15, 1980). The Comptroller General concluded:

> We find nothing in the 1978 Amendments or their legislative history that indicates that the Congress intended to eliminate the right of a prevailing Federal employee in an ADEA case to receive an award of attorneys fees. In fact, both the 1974 and 1978 Amendments generally broadened the rights of federal employees, and to construe section 633a(f) to eliminate the right to receive attorneys fees runs counter to this widening of their rights. The fact that the general statements in both sections 626(c) and 633a (c) that a court of competent jurisdiction may grant "such legal or equitable relief as will effectuate the purposes" of the ADEA were not revised

"Continued"

been pressed by the United States in other cases. 9/

C. Congressional Statements Confirm the Intention to Accord Federal Sector Employees Aggrieved by Age Discrimination the Right to Trial by Jury.

On September 5, 1979, Congressman Claude Pepper, Chairman of the House Select Committee on Aging, stressed that the right to a jury trial was equally important to federal employees and private sector workers. He indicated that Congress never intended to treat the two categories of employees differently

---

"Continued"

by the 1978 Amendments seems to indicate that Congress did not intend to significantly lessen the remedies available to Federal employees by eliminating their right to an award of attorneys fees. Id. 6-7.

9/ See, Moysey v. Andrus, 481 F. Supp. 850, 853 (D.D.C. 1979).

with respect to this right. Drawing from the legislative history, he stated:

> Since the unamended language of section 7c(1), dealing with civil actions generally for aggrieved employees, and the language of section 15c, providing a civil action for Federal employees, are virtually the same, and the Kennedy amendment was enacted to clarify the intention of Congress to authorize a jury trial under that language, it would be reasonable to suppose that the spillover from section 7c would be in the direction of assuring a jury trial under section 15c. Despite appellate decisions that hold a jury trial is authorized, and a legislative history that says the jury trial language added to section 7c is intended to clarify an already existing right, there are still those who contend that the act does not authorize a jury trial on the grievances of Federal employees.
>
> There is nothing in the House or Senate debates that indicates there was any thought that Federal employees should be denied a jury trial. 125 Cong. Rec. E 4258 (daily ed. Sept. 5, 1979) (Emphasis supplied).

Congressman Pepper also quoted from Congressman Quie's statement at the time of the 1978 amendment when the latter emphasized that the purpose of the jury trial amendment was to clarify the Supreme Court's decision in Lorillard v. Pons which left open the question of jury trial in suits for liquidated damages. In the discussion by Congressman Quie there was no mention of different treatment of federal employees and private sector employees regarding the right to jury trial.

Congressman Pepper further emphasized in his statement:

> Those who participated in the House and Senate debates would be surprised to learn that legislative efforts to confirm the right to a jury trial have been construed as a denial of that right. It would be indefensible to deny Federal employees the right to a jury trial.

> Under any legislative enactment in the field of civil rights, the federal government should be the leader not a grudging participant. At this juncture we do not know whether further legislative action will be needed to dispel any notion that Federal employees are entitled to a jury trial. As chairman of the Committee on Aging, I will continue to watch developments in this area, and will ask for further delineation of the right of federal employees to a jury trial if conflicting judicial interpretations are not resolved in favor of a jury trial.

In the 96th and 97th Congresses respectively, measures have been introduced to clarify Congress' intent to guarantee right to jury trial to federal employees under the ADEA. See, H.R. 4472, 96th Congress; and H.R. 935 in the 97th Congress. In an introductory statement accompanying H.R. 935, Congressman Weiss stated: "While it was never our intent to exclude Government workers in the 1978 amendments, Federal defendants

have argued that Congress withheld this right." 127 Cong. Rec. E81 (daily ed. Jan. 19, 1981) (emphasis supplied). Congressman Weiss stressed that any ambiguity that may exist can be traced to the drafting of the Act and not to congressional intent.

IV. CONCLUSION

The right to jury trial is an important part of the package of rights accorded victims of age discrimination under the Age Discrimination in Employment Act. That Congress intended federal, as well as all other, employees to enjoy this right is not only clear from the language of the enforcement provision governing federal ADEA suits, but is consonant with the evolution of the Act as a comprehensive statutory scheme to combat age discrimination whereever it occurs. The courts, the executive

branch, and the Comptroller General have so interpreted the Act. Therefore, for the reasons set forth above, the judgment below granting federal employees a right to jury trial in ADEA suits against their employers should be affirmed.

Respectfully Submitted,

Claude Pepper
Charles H. Edwards, III
Select Committee on Aging
House of Representatives
Washington, D.C. 20515

Edward F. Howard
National Council on Aging
Attorney for Honorable
Claude Pepper, et al.

March 10, 1981